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ECONOMIC LAW ENFORCEMENT

VOLUME VI

LEGAL ISSUES

The Judges, (detail American woodcut, 19th Century).

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ECONOMIC LAW ENFORCEMENT

VOLUME VI
LEGAL ISSUES

Final Report Submitted Under Contract #M00103910

by: The Connecticut Enforcement Project
Department of Environmental Protection
Hartford, Connecticut 06115

to: The U.S. Environmental Protection Agency
Region I
Boston, Massachusetts 02203

September 1975

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INTRODUCTION

The working papers collected in this volume set forth the legal research the Connecticut Enforcement Project (CEP) has undertaken in the course of designing economic enforcement tools for the Department of Environmental Protection. The analyses were done during various phases of the project and reflect a number of objectives: (1) to expose constitutional problems attending Public Act 73-665, the Environmental Enforcement Act, in hopes that the administrative interpretation might lead the court in a positive direction; (2) to clarify statutory and administrative law constraints to avoid unknown risk-taking; (3) to examine the legal viability of assessing violators for the entire period of non-compliance, including the period prior to detection and during litigation; (4) to detail the legal consequences attending a number of specific procedural devices. Although each section focuses on one of these objectives, a considerable conceptual overlap necessarily exists. Similarly, since many of the working papers treat closely related issues from different perspectives some repetition exists as well. The substantive material of each section is preceded by a brief abstract of each of the working papers included.

MAJOR ISSUES

The primary objective of the CEP is to design an administrative program the effect of which is to discourage delay by sources in complying with environmental standards by effectively taxing away the benefits derived from delay. In order to accomplish this goal, the CEP staff and DEP personnel have considered a wide variety of administrative tools. Many of these options raise different legal problems; taken together they present a host of legal questions which require answers before Department administrators can choose among alternative policy and administrative options. The major legal issues fall into four categories: constitutional, statutory, assessment period and procedural.

I. CONSTITUTIONAL ISSUES

The legal questions here relate to the constitutionality of the statute itself, and the success of the program is contingent upon affirmative answers to each of them. A threshold question is whether the power to impose assessments administratively has been properly delegated to the Department. The main concern here is that a court may find that the legislature violated the separation of powers doctrine by conferring on the Department a power which may properly be exercised only by the judiciary. Closely related to this is the question of whether the civil assessments are in fact criminal rather than civil sanctions. The procedural implications of this question are manifold, involving, inter alia, the right to a jury trial and proof beyond a reasonable doubt; moreover, a negative answer to this question implies a negative answer to the delegation question. A third question is whether a source who faces a civil assessment for failing to report information which could lead to a criminal sanction can be required to report the needed data despite the privilege against self-incrimination. If the privilege were applicable in this context to a large number of sources, the effectiveness of the program would be vitiated.

Delegation of Judicial Authority

Whether administrative agencies can impose civil assessments or penalties without infringing on judicial authority is a question all but settled in federal jurisdictions and in some states, notably Illinois. The authority to assess penalties has been termed "quasi-judicial," and therefore permissible, as long as the delegation is accompanied by standards to guide the agency in its use of discretion, a full hearing opportunity for the alleged violator and the availability of judical review. The Enforcement Act exhibits each of these features, but since Connecticut law remains unsettled on the question of delegation, its persuasiveness cannot be taken for granted.

The Civil/Criminal Distinction

Logically and economically, civil assessments and criminal fines have similarities often so close that distinguishing them is difficult. This is an area where judicial standards remain highly ambiguous, the cases display little clarity in reasoning regardless of holding. Because of this confusion and the result-orientation of many decisions, specific guidance is difficult to glean. Three factors in particular, however suggest that the assessments will ultimately be upheld as civil: their purpose is remedial rather than punitive; they are in part compensatory in nature; and the legislature manifestly intended them to be non-criminal. But the key to sustaining the Enforcement Act with respect to this question (and the delegation question) may well be the Department's ability to persuade the Connecticut Supreme Court that civil assessments are merely one tool among a number of administrative devices designed to control pollution and to preserve the environment, and that the Department (rather than a court) has the expertise that enables it to fashion and apply this remedy.

Self-Incrimination

Under the Enforcement Act, a source would be subject to assessment for failure to provide information required by reporting regulations. At the same time, such information could in some cases, disclose information about substantive violations for which the source would be criminally liable under other environmental laws. The question is whether the potential for such liability would permit a source to avoid complying with a departmental reporting requirement on the grounds of the Fifth and Fourteenth Amendments' privilege against self-incrimination.

With respect to corporations the problem does not appear to be a serious one, since the privilege is only available to individuals, and not to businesses. Moreover, even with respect to individuals, the use of reporting requirements to compel disclosure of information which could subject the reporting party to criminal liability exists in other areas, especially in the tax field.

II. STATUTORY ISSUES

These questions concern the Department's authority to adopt various regulatory strategies not specifically mentioned in the statute. The principles of Connecticut statutory interpretation are first considered in a general way, since they are likely to be involved in any challenge to the regulatory provisions. Next, the use of the cost of compliance as the basis for the calculation of assessments - the essence of the regulatory approach - is examined in relation to the authority conferred by section 2 of the Enforcement Act. Three other unspecified devices, the use of cost of capital in the calculations, the deferral of assessment calculations and the use of a formula rather than an "amount" in the violation notice are examined in the same context. Finally, the pattern of judicial review is explored in other areas where formulae are applied to determine remedies.

Statutory Interpretation In Connecticut

Connecticut courts generally adhere to the "plain language" or "strict construction" doctrine in examining regulations for conformity with statutes. This rule will be relaxed if a literal interpretation produces a "bizarre result" or if the meaning of the statute is not plain, but ambiguous. In the latter event the courts will look to the legislative history of the act and afford some deference to the administrative interpretation, especially if it is longstanding. In addition, a remedial statute will be construed as broadly as possible within the limits of "plain language", while a penal statute will be construed narrowly. Thus the validity of many of the regulatory provisions may depend upon the court's overall characterization of the statute.

Cost of Compliance

The use of cost of compliance as the basis for administrative assessments, subject to reduction upon consideration of other factors, appears likely to be upheld. The economic formula used to generate the schedules of maximum assessments and assessments in individual cases, employs costs of compliance as the basic data of calculation. This approach is clearly authorized by the "immediate and continued compliance" standard of §2(b) of the Act. But since §§2(b) and 2(c) prescribe additional factors to be considered, the question could arise whether the cost of compliance approach, together with the potential for later adjustment, is consistent with the statute. Consistency should not be a problem as long as each of the other factors is given explicit consideration.

Cost of Capital

The use of cost of capital in the calculations could be challenged on the grounds of unreasonableness and the absence of an evidentiary opportunity to prove a source-specific, rather than an industry-wide, rate. But precedent in Connecticut and other jurisdictions in the public utilities area indicates both that cost of capital is a generally acceptable approach and that a heavy burden of proving it unreasonable in a specific case rests on the regulatee. The method and data used to determine the cost of capital in any case appear well within judicial standards of deference to administrative expertise.

Deferral Of Assessment Calculations

The Department cannot calculate an assessment precisely in any case until it obtains specific cost information concerning the source subject to assessment. In response to this problem, the Department considered three options for deferral. The first involves the postponement of statutory notice and the issuance of a warning letter in its place. This device raises a question of statutory authorization, and this problem is explored in detail in the procedural section of the volume. The second option contemplates immediate statutory notice with crude, high estimates subject to later mitigation. This option includes the marginal possibility that the initial estimates will be found so crude as to be arbitrary and unreasonable. The third option involves notice of the formula rather than of a stated amount, and is considered more fully in a separate working paper.

Use Of Formula Rather Than Amount

Under a strict application of the "plain language" doctrine, this device would probably not be acceptable. It could be argued, however, that the administrative difficulties entailed in establishing an amount before the receipt of necessary data constitute a "bizarre result", and that a more liberal interpretation is therefore warranted.

Judicial Review In Similar Areas

Consideration of judicial review in other areas where formulae are employed in a remedial context suggests that an agency is given wide discretion in its selection of reasonable remedial tools provided that it explicitly considers every factor mentioned in the statute and affords the regulatee the opportunity of demonstrating special circumstances warranting departure from the formulae.

III. ASSESSMENT PERIOD ISSUES

Unless the period for which assessments can be made is commensurate with the period of non-compliance, the effectiveness and equity of the enforcement program will be seriously compromised. Not to include past non-compliance would encourage a source to persist in his dilatory conduct until the violation is brought to the Department's attention. Similarly, to toll the accumulation of the assessment during administrative proceedings and judicial review would invite frivolous litigation from the regulatee while he continues to reap the benefits of delay. Such exclusions from liability would drastically curtail the effectiveness of enforcement, deprive the competitors of a violator equal enforcement, and cost the state for unwarranted litigation. Only liability for the entire duration of non-compliance can make the incentive for compliance a reality. This liability involves questions of constitutionality, statutory authorization and evidentiary sufficiency.

Past Delay

The legality of including pre-detection noncompliance in the assessment period depends upon the sufficiency of notice and proof. Superficially, an assessment for past delay appears to have an *ex post facto* character about it. Neither ignorance of the law nor delays in detection excuse liability, however. Sources are subject to no new requirements under the enforcement program. Instead, the Department is simply employing a new tool to enforce existing laws.

Articulating liability for pre-detection noncompliance entails a choice between creating a presumption of continuing violation or stating an economically based remedial policy. The Department is less interested in establishing a violation of emissions standards by any source on any given day than in ensuring that proper control equipment is installed to reduce the risk of excess emissions during normal plant operations.

Thus, whether a source violates on a given day or not is less important than whether an investment in a control technique was necessary, and if so whether that investment was made on time. Articulating this policy toward the timing of investment avoids the need for the Department to prove an emissions violation on each day for which assessment is made. The Department need only prove the single violation, the need for a control technique investment and the source's failure to make that investment in the past. Such a policy decision is less prone to judicial scrutiny than is an evidentiary presumption of continuous past violation.

Assessment Accrual During Litigation

The argument may be made that assessments which accrue during litigation discourage a source from pursuing his administrative and judicial remedies. In fact, however, an assessment accruing during this period does no more than neutralize what would otherwise be a net gain, and thus an incentive to litigate. Case law is replete with instances in which courts have upheld devices designed to deter frivolous litigation (bonding requirements, filing fees, etc.) and to tax away the use of money during the appellate period (interest accrual during tax appeals, interest accrual during damage actions, etc.). Moreover, a source which questions the applicability of environmental standards can initiate a proceeding for a declaratory ruling without risk of liability. Courts have held that failure to test liability by declaratory ruling brings risk of liability through enforcement. Finally, the Connecticut courts retain discretion to toll accumulation should they find it to be an unreasonable financial imposition on the source.

IV. PROCEDURAL AND MISCELLANEOUS ISSUES

The materials in this section explore the legality of two general procedural devices - issuing a warning letter before a notice of violation, and deferring part of a hearing if adequate cost data is unavailable at the time. This section also includes analyses of several smaller questions related to specific programs.

The warning letter provision is embodied in subsection 602(f)(1) and was included in response to industry requests that some informal notice, followed by an opportunity to correct, be given a source before a formal assessment notice is sent. The Enforcement Act makes no reference to warning letters, however, and the question arises whether such a device is beyond the Department's statutory authority.

The purpose of the hearing deferral/partial final order provision in §602(f)(2) and in parallel sections of the regulations for water pollution, coastal filling, and operation and maintenance is to grant the Department staff sufficient time to collect cost data necessary for the determination of the precise amount of the assessment. The questions here are whether such a provision is within the Department's authority, whether it conflicts with the Administrative Procedures Act or whether it violates due process.

Four procedural questions concerning individual enforcement units are also examined:

(1) Are polluters who began discharging waste water prior to May 1, 1967 liable under Connecticut's Clean Water Act or the Federal Water Pollution Control Act to an assessment for operating without a permit?

(2) What is the scope of judicial review for Operation and Maintenance requirements embodied in regulations, permits or orders, or used to prove emissions violations?

(3) Can Operation and Maintenance requirements be imposed upon a large number of sources by way of a class-wide order?

(4) What evidentiary effects follow from a source's failure to monitor his operations or his tamping with monitoring devices?

Warning Letter

Although no specific mention of a warning letter is made in the statute, the device is within the express authority of the Commissioner to adopt procedural regulations necessary to carry out his responsibilities. It is necessary to avoid frustrating the administration of §2(c) of the Enforcement Act, and it is consistent with case law in Connecticut setting forth limits of discretion in adopting regulations to implement statutory mandates.

Hearing Deferral and Partial Final Order

The scheme set forth in 602(f) and in parallel sections in companion regulations is not expressly authorized in the Enforcement Act, but neither does it directly conflict with any of the provisions of the statute. Moreover, it functions within a total regulatory scheme that is clearly within the authority of the Department. The provision itself is unlikely to offend due process, but an egregious delay in any particular case may well be subject to judicial disapproval.

Liability of Pre-1967 Polluters

If the Department has the discretion to impose an assessment for preexisting liability of some kind, the incidence of dilatory litigation is likely to decline. Polluters who commenced discharging after May 1, 1967 are liable to large assessments for operating without a permit. Those who commenced discharging before May 1, 1967 may be similarly liable, but only after they have failed to renew a permit issued after compliance with an abatement order. An amendment to the state Clean Water Act is suggested to resolve this issue.

Issues Relating To The Operation and Maintenance Program

The scope of judicial review is likely to be relatively narrow if Operation and Maintenance requirements are embodied in regulations. Should they be included in an order to an individual source, the scope is somewhat broader. The primary potential for reversal would be on grounds of "unlawful procedure," in particular, if the Department refused to consider unverifiable evidence from the source which the reviewing court might deem pertinent.

Imposition of Operation and Maintenance requirements by means of an order to a well-defined class of sources would be the most efficient procedure available to the Department. Such a device appears to be legally valid provided that the class can be defined with sufficient precision, but the possibility that the courts might view the order as a disguised regulation cannot be dismissed.

If Operation and Maintenance standards are nowhere prescribed, they may nonetheless serve as a standard of proof for an emissions violation. The failure of a source to meet such standards will support an inference of emissions violation necessary to sustain an assessment. However, proof of a single operation and maintenance deficiency will probably be insufficient to satisfy the Department's burden of proof for establishing a continuous O&M violation over the period since control equipment was installed.

If a source either fails to keep or tampers with required monitoring information, a hearing officer could either create an adverse inference (or presumption) arising from such failure or restrict the scope of admissible evidence as a countermeasure. The former alternative will probably succeed in a case where the source has destroyed the information. But it will probably fail if the source has never kept the evidence, unless the courts can be persuaded to alter precedent by permitting the inference to stand in lieu of a prima facie case. Any mandatory restriction of evidence is apt to be held a procedural error by the courts, but a voluntary agreement to this effect by the source remains a distinct possibility.

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I CONSTITUTIONAL ISSUES

DELEGATION OF JUDICIAL AUTHORITY

Although the issue has been raised on numerous occasions, the U. S. Supreme Court has never held that judicial authority had been improperly conferred upon an agency. The Court has also consistently upheld the administrative imposition of civil assessments.

State courts have generally followed the federal lead, provided that the delegation was accompanied by adequate standards to insure against abuse of power. The Illinois court, in particular, upheld a statute similar to Connecticut's Enforcement Act because it provided for adequate opportunity for hearings and judicial review, and because it established a set of guidelines within which the agency was required to act.

The issue has not been decided conclusively in Connecticut. One early case let stand the conferral of quasi-judicial authority upon a local board of health because the power was deemed necessary for the preservation of public health. The authority in question, however, was the ordering of the destruction of artificial oyster beds, and the threat to public health was a scarlet fever and diphtheria epidemic. In a recent case, the Connecticut Supreme Court, in dicta, expressed disapproval of an antitrust "civil penalty" to be imposed by the Attorney General. The reasoning, however, was that the civil penalty was not remedial in character.

Collection procedures in Connecticut have been uniformly upheld as necessary incidents to other powers.

To: CPEP Legal Staff Date: November 4, 1974
From: David Rivers
Memorandum re: Summary of Law Concerning Legislative Delegation of Judicial Authority

Introduction

The following memorandum is intended as a brief survey of case law as applied to the issue of whether the civil penalties provision of Section 2, Public Act 73-665 is an unlawful delegation of judicial authority to a state administrative agency.[1] Simply stated, the question is whether the authority of the Commissioner to determine whether a violation of a regulation exists, to impose a civil penalty for such violation, and to execute unappealed final decisions as judgments of the Superior Court offends principles of separation of judicial and executive power.

Use of civil monetary penalties is a relatively recent development in administrative law, but the delegation issue has been raised in many similar situations, and the resulting decisions are applicable. It must be kept in mind, however, that the question of judicial authority is peculiar to each jurisdiction, based on the wording of its constitution and its own particular theory of separation of powers. Thus, federal cases upholding delegation may be partly based on the plenary power of Congress over matters concerning aliens or commerce.

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[1] Use of the term "delegation" is, of course, a misnomer since a legislature cannot delegate a power it does not have. Properly phrased the issue concerns the attempt of a legislature to confer judicial authority on an agency, State Ex. Rel. Lanier v. Vines, 274 N.C. 486, 164 S.E. 2d. 161 at 166. However, since delegation is used almost uniformly throughout the cases, it will be used here as well.

See, e.g., Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1908); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). Likewise, a state case may depend on provisions peculiar to that state's constitution, as in State Ex. Rel. Lanier v. Vines, cited in footnote 1, where North Carolina's constitution specifically provided for vesting administrative agencies with judicial powers. For the most part, though, the decisions tend to follow similar lines of reasoning and there is frequent borrowing from the case law of other jurisdictions.

Delegation of Judicial Authority

Perhaps the best statement of the problem and its development was given by Hammond, C.J., in State Insurance Commissioner v. National Bureau of Casualty Underwriters, 248 Md. 292, 298-299, 236 A. 2d. 282, 285-286:

> In the earlier days of the exercise of governmental powers by administrative bodies, there was widespread fear that the delegating of administrative, legislative and judicial powers or functions to a single agency not only violated the theory of separation of powers but spelled its death knell. Emotional resentment against the rise of administrative power by lawyers and judges rose and resulted in efforts to thwart or destroy this veritable fourth branch of government by invoking the separation of powers theory or using the non-delegation doctrine or requiring a full and complete de novo judicial determination. These efforts had no more success than had the plaintiff in the case of King Canute versus The Sea. Legislatures, national and state, steadily continued to increase administrative agencies and administrative power (cite omitted), and as these agencies have proliferated they have come to legislate more than legislatures and to adjudicate more than courts . . . .

> The early fears of the bar and bench have largely disappeared with experience. It became apparent that the complex problems of modern social, economic and industrial life for ever-increasing numbers of people could be solved or settled more expeditiously, cheaply and simply by administrative processes than by traditional executive, legislative and judicial processes, because the blending of powers in one agency, which operates in its particular field or specialty continuously over the years and produces an expertise and a superior ability both correctly to evaluate specialized questions and to supply correct answers to these questions--often due largely to the staff of permanent, expert employees who serve under the successive heads of the agencies; and secondly, it was recognized that the dangers inherent in government by administrative bodies lie not in the blending of powers in a single body but in permitting that body's power to be beyond check or review.
>
> The checks on administrative power have been supplied.

It is significant, as Davis says, that, though the issue has often been presented, the United States Supreme Court has never held that judicial power has been improperly vested in an administrative agency, Davis, Administrative Law, §2.12. As early as 1888, the Court was faced with the question of whether it was proper for the Postmaster General to determine amounts of forfeitures on mail carriers who failed to carry mail within time limits contractually prescribed. The power was held to be properly conferred by statute, within the Postmaster General's discretion, and therefore not subject to review by the Court.

Other early cases affirmed the quasi-judicial function of administrative agencies. In Oceanic Navigation C. v. Stranahan, 214 U.S. 320 (1908), the court upheld a section of the Alien Immigration Act which allowed imposition of a penalty on transportation companies for bringing in aliens with loathsome or contagious diseases. The argument was made that even though matters concerning aliens might be wholly within the powers of Congress, the Act was nonetheless unconstitutional as defining a crime and then authorizing an administrative official to determine whether the crime had been committed and to inflict punishment. The Court responded by stating that the Act clearly distinguished those situations where particular violations were intended to be criminal" . . . and those where it was contemplated that violations should not constitute crimes, but merely entail the infliction of a penalty, enforceable in some cases by purely administrative action . . ." 214 U.S. at 337. Looking to the purpose of the Act, the Court said that it tended, through the avoidance of controversy and delay, to secure the efficient performance by transportation companies of medical examinations before embarkation, thus carrying out the policy of Congress. Finally, as to the argument that imposition of penalties must be governed by rules controlling criminal prosecution, the Court stated that this was ". . . clearly without merit, and is not open to discussion." 214 U.S. at 338. The Court followed through on its holding in Stranahan a year later by holding in Monongahela Bridge Co. v. U.S., 216 U.S. 177 (1909) that to deny Congress the authority to delegate power to determine some fact or state of things upon which enforcement of its enactment may depend, would often render it impossible or impractical to carry on the public business.

The determination of later cases followed these earlier decisions. In Zakonaite v. Wolf, 226 U.S. 272, involving deportation of an alien for practicing prostitution (where the appellant was actually arrested and held in custody) the objection that the statute vested judicial powers in the executive branch was held to be "without substance and requires no discussion." And in Arver v. U.S., 245 U.S. 366, the selective draft statute for raising an army during WWI was held not to be void as conferring judicial power on an administrative officer. Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, held that conferring authority on the ICC to determine whether railways were subject to the provisions of the Railway Labor Act was not an unconstitutional delegation of power. In Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, the Court held that it was not unconstitutional for Congress to delegate to an administrative agency authority to determine the question of fact whether a particular coal producer fell within the Bituminous Coal Act. The Court stated that "to hold that there was an invalid delegation of judicial power would be to turn back the clock on at least a half century of administrative law." 60 S. Ct. at 915. Finally, it has been held that findings of fact by administrative bodies may be made conclusive, Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163, and it is now considered well settled that a court has no right to review and redetermine questions of fact considered and lawfully determined by an administrative authority, N.A.

Woodworth Co. v. Kavanagh, 102 F. Supp. 9.

Administrative Authority to Assess Civil Penalties

Consistent with its affirmance of quasi-judicial authority for administrative agencies, the Supreme Court has also upheld administrative assessment of civil penalties.

A monetary penalty for bringing in aliens with physical or mental diseases or defects under the Immigration Act of 1917 was upheld in Lloyd Sabando Sosieta v. Elting, 287 U.S. 329. The court found that due process did not require that courts, rather than agencies, determine the facts on which a penalty depends. It was further found that Congress could choose the administrative rather than judicial method of imposing penalties since they were neither unreasonable nor confiscatory in amount. The Court did state, however, that the administrative action would be subject to judicial review to determine whether it was within the statutory authority, whether the evidence supported the determination, and whether the procedure adopted satisfied elementary standards of fairness and reasonableness essential to the due administration of the summary proceeding which Congress had authorized.

Recent federal cases have more or less taken for granted the validity of this administrative authority. In Nadiak v. C.A.B., 305 F. 2d. 588 (5 Cir. 1962), the Court stated that in highly technical areas the need to evaluate the offending act and fashion a suitable remedy requires that an agency be vested with a wide range of discretion in imposing penalties. Judicial review would be confined, the court went on, to the inquiry whether an abuse of discretion had occurred. Where a 600 dollar penalty was imposed under the OSHA of 1970, the court dismissed with one line the contention that the penalty was an unconstitutional abridgment of the petitioner's right to criminal enforcement only through the courts--"Civil penalties are not uncommon in federal law, and Congress here clearly intended to create a civil sanction." American Smelting and Refining Co. v. Occupational Safety and Health Review Commission, No. 73-1721, U.S. Ct. of Appeals, 8th Cir., filed July 15, 1974.

Decisions on the state level generally follow the analysis used in the federal cases. The Illinois Supreme Court held that the Tax Department's power to assess penalties under the Retailers Occupation Tax Act was ministerial, not judicial, merely requiring calculation or computation from data on which all minds must ordinarily reach the same result. A Utah statute, 54-7-25 (1), U.C.A., 1953, authorizing a penalty of $500 to $2000 for each violation or failure to comply with any order of the Public Service Commission, was challenged as criminal and therefore beyond the power of the P.S.C. to determine whether violations had been committed. In upholding the statute, the state Supreme Court said there was no question that the Commission was required to and did perform some functions of a judicial or quasi-judicial nature and that the legislature could validly confer the power to enforce the law and regulations by administrative procedure. The court added, however, that since this was a penalty closely akin to criminal penalties, evidence of violations, although not having to be beyond a reasonable doubt, should at least be clear and convincing, Wycoff Co. v. Public Service Commission, 13 Utah 2d. 123, 369 P. 2d. 283 (1962).

Standards for Sustainable Delegation

State courts have been concerned with preventing abuse of powers granted to administrative agencies. Thus, the Florida Supreme Court has required that where the legislature delegates to a quasi-judicial agency the power to adjudicate private rights, it is essential that the act so delegating define with reasonable certainty the standards which will guide the agency in the exercise of the power, Delta Truck Brokers, Inc. v. King (Fla.), 142 So. 2d. 273. Similarly, the Maryland Court of Appeals, in County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A. 2d. 225 (1973), while specifically holding that ". . . the authority to impose a civil monetary penalty is not a power beyond constitutional delegation to an administrative agency . . .," found the particular penalty involved (for violation of landlord/tenant ordinance) illegal because of " . . . the total absence of any legislative safeguards or standards to guide (the agency) in exercising its discretion . . .", 312 A. 2d. at 246. Availability of judicial review is also held to be essential, one court stating " . . . at this advanced date in the development of administrative law, we see no constitutional objection to legislative authorization to an administrative agency to award, as incidental **to relief in connection with a** subject delegable to it, money damages, ultimate judicial review thereof being available." Jackson v. Concord Co., 54 N.J. 113, 253 A. 2d. 793 at 800 (1969). Where the legislature has not expressly provided for judicial review, a court may utilize its inherent powers to prevent illegal, unreasonable, arbitrary or capricious administrative action, State Insurance Commissioner v. National Bureau of Casualty Underwriters, 248 Md. 292, 236 A. 2d. 282. The Washington Supreme Court, in upholding the administrative award of damages in a case involving discrimination in a housing transaction, set forth a test to be used in reviewing legislation granting an agency the power to impose penalties or assess damages. The legislation should:

> (1) define the conduct sought to be punished or the injury to be compensated
> (2) set out the normally acceptable limits of punishment or compensation, and
> (3) allow the adjudicative body to determine the appropriate punishment or compensation by applying general principles of morality and traditional concepts of justice.
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> Rody v. Hollis, 81, Wash. 2d. 88,
> 500 P. 2d. 97 at 100 (1972).

At least one state has had occasion to review thoroughly a statute similar to Connecticut's civil penalty legislation. Illinois' Environmental Control Act (Ill. Rev. Stat. 1971, Ch. 111 1/2, Par. 1041), Sections 33(c) and 42, authorize a penalty of up to $10,000 for violations of the Act or regulations adopted under it, and an additional penalty of $1,000 per day for each day the violation continues. The petitioner in Ford v. EPA, 9 Ill. App. 3d. 711, 292 N.E. 2d. 540 (1973), claimed that the imposition of a monetary penalty was a judicial function which could not be delegated to an administrative officer or agency. The Appellate Court for the First District upheld the statutes saying that, while it was clear that an administrative agency could not impose criminal penalties, an administrative officer or agency could penalize, without offending the constitution, when the penal function was incidental to the duty of administering the law. The court stated that the legislature intended a civil sanction, there being no mention of crime or criminal prosecution and there being a distinctly civil procedure for collection of penalties imposed. "Although the essentially legislative and judicial powers cannot be delegated, we believe it implicit in the authorities that where direct or immediate judicial action is inexpedient or impractical, quasi-judicial functions may be conferred upon and exercised by an administrative agency, provided the laws conferring such powers are complete in their content, are designed to serve a general public purpose, are such as to require consistent and immediate administration, and further provided that all administrative actions are subject to judicial review." 292 N.E. 2d. at 543-544.

Subsequent to Ford, Section 42 of the Environmental Control Act was challenged in three other cases. The Third District upheld the statute, Incinerator, Inc. v. Ill. Pollution Control Board, 15 Ill. App. 3d. 514. It was held invalid in the Second and Fifth Districts, Waukegan v. Pollution Control Board, 11 Ill. App. 3d. 189, and Southern Baptist Asphalt Co. v. EPA, 15 Ill. App. 3d. 66. Faced with this split in the districts, the State

Supreme Court agreed to hear Waukegan on appeal, 6 E.R.C. 1395 (No. 45984, March 29, 1974). As stated in the decision, only one question was before the court. "Was the authority given the Board to impose monetary penalties under the Environmental Protection Act (cite omitted) a delegation of judicial power in violation of the separation-of-powers provision of the Constitution of Illinois or of the Constitution of the United States?" 6 E.R.C. at 1396. After reviewing U.S. Supreme Court and state cases, the Illinois court concluded "It is clear that the trend in state decisions is to allow administrative agencies to impose discretionary civil penalties." 6 E.R.C. at 1398. It was held that the authority given to the Pollution Control Board to impose monetary penalties did not violate the constitutional separation of powers. The court recognized three important provisions of the Act:

> (1) that there was a detailed hearing provision,
> (2) there was adequate judicial review, and
> (3) the statute established guidelines that the Board must follow in imposing penalties, concluding that, "The legislature may confer those powers upon an administrative agency that are reasonably necessary to accomplish the legislative purpose of the agency." 6 E.R.C. at 1400.

Connecticut Cases

A search of Connecticut case law indicates that the question of conferring judicial functions on state agencies has not been conclusively decided.[2] The existing case law concerns delegation of legislative powers to administrative agencies (see, e.g., State v. Stoddard, 126 Conn. 623, Keating v. Patterson, 132 Conn. 210, Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109, and cases cited therein) and the converse of the present problem, i.e., the attempt to confer administrative powers on the judiciary (see e.g., State Water Commission v. City of Norwich, 141 Conn. 422, Chernesky v. Civil Service Commission of the City of Bridgeport, 141 Conn. 465, Jaffe v. State Department of Health, 135 Conn. 339). Despite the absence of decisive precedent, the Court has indicated its sensitivity to the judicial delegation issue: " . . . there has remained no doubt that our Constitution is to be construed as a grant and not a limitation of power, and that the exercise of judicial power is forbidden to the legislative branch of the government, as the legislative is to the judicial," Bridgeport Public Library and Reading Room v. Burrough's Home, 85 Conn. 309 (1912). See Szarwak v. Warden, Vol. XXXVI, No. 4 Conn. Law J. 1 (Supreme Court, 1974).

The State Supreme Court considered the problem of delegation of judicial authority in an early case, Raymond v. Fish, 51 Conn. 80 (1883), concerning a local board of health which had destroyed

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[2] The constitutional provisions involved are Article 2 and Article 5, Section 1, Conn. Constitution of 1965.

Article 2 provides: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistry, to wit, those which are legislative to one; those which are executive to another; and those which are judicial to another."

Article 5, Section 1 provides: "The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time artificial oyster beds in the belief that they were contributing to an epidemic of scarlet fever and diphtheria. The board operated under a statute granting it "all the power necessary and proper" for preserving public health and preventing the spread of disease, and imposing the duty to remove all filth which in their judgment endangered health. The plaintiff argued that the statute conferred judicial powers upon a tribunal not warranted by the constitution. The court upheld the statute as a valid police regulation for the public health. It cited with approval a Massachusetts case, City of Salem v. Eastern Ry. Co., 98 Mass. 431, which stated, "There are many cases in which powers of determination and action, of a quasi-judicial character, are given to officers entrusted with duties of local or municipal administration, by which not only the property but the lives of individuals may be affected." 51 Conn. at 101. To date, Raymond still stands as the law in Connecticut.

One lower Connecticut court did recently consider the civil penalty problem. In dicta, without deciding the issue, the court in Mobil Oil Co. v. Killian, 30 Conn. Sup. 87, 301 A. 2d. 562 (1973), questioned the validity of the civil penalties provision of the state's Anti-Trust Act, Section 35-38, C.G.S., noting that the legislature could not confer power of criminal

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[2] Continued. to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."

prosecution on the attorney general (an executive official) because of the separation of powers doctrine of Article 2 of the State Constitution. The court, however, based its reasoning on the fact that the penalty section (unlike the treble damages and injunctive relief sections of the Act) was not designed to be remedial in character. It is important to note that the penalty in Mobil Oil was not part of any regulatory scheme, but was simply imposed any time a violation of the Anti-Trust Act was found to exist.

Turning to Section 2, P.A. 73-665, itself, the civil penalties provisions fit within the requirements of proper delegation of authority as delineated by the case law. The legislature has effectively circumscribed any discretion conferred upon the Commissioner. In Subsections 2(a)(1) through (4) the amounts of penalties that may be adopted in a penalty schedule are given specific limits for each individual type of violation. Subsection 2(b) sets forth legislative guidelines to be used in adopting a fee schedule and Subsection 2(c) provides detailed guidelines for imposing a penalty in any individual case. Due process requirements are imposed in Subsection 2(d), (e) and (f). Detailed notice must be given to any person believed to be in violation. There is opportunity for hearing, and all hearings must be conducted pursuant to the Administrative Procedures Act (Sections 4-177 to 4-184, C.G.S.). Any decision imposing a civil penalty is subject to judicial review.

It is also clear on the face of the Act that the legislature intended it to be remedial in nature. Section 1 of P.A. 73-665 allows the commissioner to maintain a civil action for damages where regulations are violated or harm is done to the environment. But where such a suit is instituted, the commissioner is precluded from imposing a civil penalty. Thus, the civil penalty provision is meant as an alternative to the damages provision, not as a punitive provision. Moreover, the civil penalties provisions have been completely separated from criminal sanctions (e.g., Section 19-508a, C.G.S.). Unlike the penalty involved in Mobil Oil Co., supra, the penalty provisions of Section 2, P.A. 73-665, are a part of an integrated regulatory scheme, necessary in performing the administrative function and carrying out the legislative policy of protecting the public health and environment.

Execution of Final Decisions

A final and related problem is the method used in collecting the civil penalties. Subsection 2(h) of P.A. 73-665 allows an order assessing a civil penalty to be filed with the clerk of the superior court, and then to be docketed, given the same effect as, and enforced as a judgment of the court. The question may arise as to whether this method of enforcing penalties is an invalid delegation of judicial authority.

In Mallat v. Luihn, 206 Ore. 678, 294 P. 2d. 871 (1956), the court considered Oregon's Relative Support Act requiring reimbursement from relatives of recipients of old age assistance.

The Public Welfare Commissioner was allowed to issue a warrant under his own hand that would be entered on the judgment docket and collected as a judgment lien. It was held that this was not an unlawful delegation of judicial power. The court found that the mere fact that some functions usually performed by courts are conferred upon an administrative body does not necessarily bring the legislation into conflict with the principle of separation of powers. It was concluded that the state had the right to collect its pecuniary obligations by summary proceedings when, as in the case at hand, judicial review of the administrative decision was available. The issue was again raised in Mazama Timber Products, Inc. v. Lane Air Pollution Authority, (Ore. Court of Appeals, No. 2, 131, April 29, 1974). The statute involved allowed the air pollution authority to collect civil penalties for violations of its regulations by filing its order with the county court. The order was given the status of a judgment, became a lien on real property, and execution could issue. Relying solely on Mallatt the court held there was no violation of separation of powers as conferring judicial functions on an agency, since orders were subject to judicial review under the Administrative Procedure Act.

The Connecticut Supreme Court considered the question in Wilcox v. Madison, 106 C. 223 (1927), where the plaintiff claimed that a tax warrant issued by the tax collector was illegal since it was, in its essentials, a judicial process in the nature of a final execution allowing levy on goods, chattels or real estate, and therefore must have judicial sanction.

The court found that, "This method of collecting taxes without recourse to the courts is necessary to the full execution of the powers of the executive department of the State, and it is not in violation of the division of powers made by the Constitution." 106 C. at 231.

The civil penalties collection provision of Subsection 2(h) would appear to fall within the rationale of Wilcox. Furthermore, as in Mazama Timber, orders of the Commissioner imposing civil penalties are reviewable under Connecticut's Administrative Procedure Act. There should, therefore, be no serious problem with validity.

THE CIVIL/CRIMINAL DISTINCTION (I)

Connecticut's civil assessment program is likely to be found civil rather than criminal in nature for four reaons.

First, the program is regulatory rather than punitive. The assessment serves only to equate the economic statutes of a non-complying source with that of his law-abiding rivals, and may be waived upon assurance of prompt compliance. Its focus is therefore prospective, directed toward the need for compliance, rather than retrospective, centering upon sanctions for past activities. Case law indicates that the courts will declare a statute or regulation to be civil as long as it is predominantly remedial in character.

Second, the statutory scheme is sufficiently compensatory in nature to qualify as civil. Although the directly compensatory section of the statute (section one) is not utilized, the civil assessment section (section two) was clearly viewed by the General Assembly as interchangeable with it. Moreover, the civil assessments themselves operate in part as compensation, albeit inexact, for probable inquiry in a variety of forms including damage to public goods (the environment), frustration of public policy and expenses incurred for investigation and enforcement.

Third, the unquestionable intent of the General Assembly was to make the assessments civil as opposed to criminal.

Fourth, the program meets most of the general (not individually dispositive) requirements set forth in the leading U. S. Supreme Court case dealing with the civil/criminal distinction, Kennedy v. Mendoza-Martinez.

Civil/Criminal Distinction I

TO: CPEP Staff DATE: October 31, 1974

FROM: Andy Weissman

SUBJECT: The Enforcement Act and the Civil/Criminal Distinction

I. Introduction

One claim likely to be raised against the Civil Penalties Enforcement Program is that the underlying statute purports to authorize an administrative agency to impose assessments which are, in effect, penal or criminal sanctions. If the claims were accurate, such an attempted delegation of authority would be invalid, since the Judicial Branch possesses sole jurisdiction over the application of criminal sanctions.

This memorandum provides legal support for the contention that the civil penalties statute is civil in nature, and therefore that it should be sustained over a challenge based on the alleged criminality of the civil penalties which the Commissioner is authorized to assess.

II. Two Underlying Lines of Cases on the Civil/Criminal Distinction

Only two U.S. Supreme Court cases directly address the abstract issue of what factors enter into a determination of the civil or criminal nature of a statute. Huntington v. Attril, 146 U.S. 657 (1892), involved a case where the Maryland courts had refused to recognize a New York judgment because it was based upon a New York statute that was "penal" in nature. The Court stated the test as to whether a law is penal "in the strict sense" as "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." This "strict sense" standard has been broadened by later cases, see *United States v. Tucker*, 161 U.S. 475 (1896), where a forfeiture for the fraudulent importation of merchandise was held non-penal despite the fact that the penalty was triggered by the commission of a public offense; see *Hepner v. United States*, 213 U.S. 103 (1909). Nevertheless, the *Huntington* doctrine has developed into a rule which bases the civil/criminal distinction on a compensation standard; that is, whether plaintiff is recovering damages based in some form on injuries caused by defendant. See *Bolles v. Outing Co.*, 175 U.S. 304 (1924); *Sullivan v. Associated Billposters and Distributors*, 6 F.2d 1000 (2d Cir. 1925); *United States v. Price*, 290 F.2d 525 (6th Cir. 1961); *Banks v. Watrous*, 134 Conn. 592 (1948); *Lamphear v. Buckingham*, 33 Conn. 237 (1866); *Pierce v. Albanese*, 144 Conn. 241 (1957); *Tracey v. New York, New Haven & Hartford Railroad Co.*, 82 Conn. 1 (1909).

The other leading case is *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962), where the Court articulated a list of factors that should be used to make the civil/criminal distinction:

1. Does the sanction involve an affirmative disability or restraint?
2. Has it historically been regarded as punishment?
3. Does it come into play only on a finding of *scienter*?
4. Does it promote the traditional aims of punishment: retribution and deterrence?
5. Is the behavior to which it applies already a crime?
6. Is there a rationally connected alternative purpose other than punishment?

7. Is the penalty excessive in relation to the alternative purpose assigned?

In reciting these criteria, however, the Court was careful to indicate that they are secondary considerations subordinate to "the objective manifestations of congressional purpose," which are the foremost considerations. The named criteria are relevant only after these "manifestations" fail to indicate clearly a punitive or remedial intent. 372 U.S. 144 at 168.

With these two cases in mind, it is possible to present the reasons why the civil penalties statute is civil in nature.

III. The Statute Is Civil in Nature Because It Is Regulatory Rather Than Punitive.

The courts have often tested the criminal nature of a statute by looking for a punitive intent, and, similarly, have used a remedial or regulatory purpose to find a statute civil. This factor was among those listed in Mendoza-Martinez, supra. In addition, the U.S. Supreme Court has stated this standard in a multitude of other cases. For example, in Perez v. Brownell, 356 U.S. 44 (1958), the Court held that a statute providing for the divestiture of citizenship of those voting in a foreign election was non-penal because there was a valid regulatory purpose: the control by Congress over potentially embarrassing international situations. Compare Trop v. Dulles, 356 U.S. 86 (1958), using the same standard and finding a divestiture of citizenship for wartime desertion penal in nature. See also United States v. Constantine, 296 U.S. 287 (1935) (both majority and dissenting opinions); Helwig v. United States, 188 U.S. 605 (1903); Flemming v. Nestor, 363 U.S. 603 (1960); United States v. Shapleigh, 54 Fed. 126 (8th Cir. 1893); Iowa v. Chicago B. & Q.R. Co., 37 Fed. 497 (C.C.S.D. Iowa 1889); Sullivan v. Associated Billposters and Distributors, 6 F.2d 1000 (2d Cir. 1925); United States v. Witherspoon, 211 F.2d 858 (6th Cir. 1954).

The courts have consistently found statutes non-criminal when the sanctions they impose have the purpose of providing a remedy to an injured party rather than punishing the defendant. See, e.g., Lapinski v. Copacino, 131 Conn. 119 (1944); Plumb v. Griffin, 74 Conn. 132 (1901); and the cases cited in section II, supra. In addition, courts which find the purpose of a penalty regulatory rather than punitive will declare a statute non-penal in nature. Thus, in Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621 (N.D. Ill. 1963), the Court found that a statutory provision depriving a citizen of the use of a telephone when he is found using it for gambling purposes was not criminal in nature because its purpose was not punishment, but rather the curtailment of professional gambling activities. Compare Hiss v. Hampton, 338 F. Supp. 1141 (D.C. D.Ct. 1972) where the Court held that a statute eliminating pension benefits for those perjuring themselves before Congressional committees was criminal because there was no regulatory purpose, but, to the contrary, the intent of Congress was to punish these persons. See also United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972).

A few courts have allowed some punitive purpose while still finding the overall statute civil in nature as long as the basic intent is remedial or regulatory. Thus, for example, the Court in United States v. Southern Pacific Co., 162 Fed. 412 (N.D. Calif. 1908), found a statute providing penalties for cruelty to animals in transport civil even though punishment was one motive for the provision. And in Roberge v. Burnham, 124 Mass. 277 (1878), plaintiffs brought suit for a $100 statutory forfeiture resulting from the serving of liquor to their minor son. The Court held that proof beyond a reasonable doubt was unnecessary even though the seller was being punished:

> "True, this action, like all penal actions, partakes somewhat of the character of punishment; but this does not make it a criminal prosecution. When the legislature gives to the plaintiff a civil action, partly remedial in its nature, it is to be presumed that it is intended that the usual incidents of all civil actions should attach."

The Environmental Enforcement Act itself makes clear that no form of punishment is intended by the imposition of civil penalties. The underlying purpose of the statute is the achievement and maintenance of acceptable environmental and ecological conditions. This is undoubtedly a valid regulatory function of the State. Every regulatory scheme involves a detrimental effect upon individuals and businesses because it most often limits activities that would be in the interest of those persons or businesses. For example, control over and licensing of establishments serving intoxicating liquors is traditionally within the scope of power of the Liquor Control Commission, and the civil quality of these actions is beyond dispute, Pangburn v. Civil Aeronautics Board, 311 F.2d 349 (1st Cir. 1962), yet those businesses violating the rules will suffer either license suspension or license revocation, with the subsequent loss of livelihood by the owner. Civil action with these kinds of extreme results is common in Connecticut and yet provide harsher penalties than the civil assessments that are authorized under the present statute. See, for example, Jaffe v. State Department of Health, 135 Conn. 339 (1949); Konia v. Liquor Control Commission, 137 Conn. 327 (1950); Gibson v. Connecticut Medical Examining Board, 141 Conn. 218 (1954); Manfredi v. United Aircraft Corp., 138 Conn. 23(1951).

The non-punitive nature of the civil penalty scheme is made apparent by § 2(c) of the statute (P.A. 73-665), and this remedial purpose is carried forward in the Commissioner's interpretation of the act embodied in the proposed regulations. Section 2(c) of the statute lists the factors to be considered when determining the size of a civil penalty. The factors mentioned are manifestly not oriented towards punishment, but rather reflect the regulatory nature of the scheme. Only two of the seven considerations involve the conduct or past activity of the source in question [Sections 2(c)(3) and 2(c)(4)], and the remainder reflect a concern over the effect on the environment [2(c)(2)]; the financial ability of the source to withstand a pecuniary penalty [2(c)(5)]; detrimental health effects of the violation [2(c)(6)]; the interference with reasonable uses of other property in the vicinity [2(c)(7)]; and, most importantly, the most effective method of insuring immediate and continued compliance [2(c)(1)]. Each of these last five factors is aimed at regulatory concerns and the quality of the environment and not at the illegal activities engaged in by a violator.

Section 602(e) of the proposed regulations reflects these same concerns and indicates that the regulations continue to focus upon regulatory rather than punitive purposes. But the regulations go further than this, for in section 602(g)(4) a mandatory waiver of any penalty is provided if the detected source submits a reasonably prompt compliance plan after receiving a warning letter notifying it of the detected violation. The purpose of the regulations could not be shown more directly than here: despite a past violation (which a punitive scheme would penalize under any condition), the Department will waive the penalty if the source exhibits efforts to cooperate in coming into compliance. The focus is the need for compliance, not the past activity of the source. The penalty becomes, therefore, entirely prospective, while criminal penalties are always retrospective.

The method by which the size of any penalty is calculated [see Section 602(d)] also indicates the non-punitive nature of the assessment. No assessment will be greater than the advantages that a source has gained by failing to come into compliance. The most that a penalty can represent is the taxing away of benefits achieved by violating emissions standards or the terms of an order. A purpose to punish would be effectuated by penalizing activities outside of the law with a pecuniary fine which achieves retribution and/or deterrence. Here, the assessment serves only to equalize the economic status of the source with that of those who have come into compliance. This scheme is no more punitive than the 6% annual surcharge upon court judgments that remain unpaid -- in both cases the effort is to place the liable party back into the same economic position it occupied at the earlier date.

Thus even under the harsher of the judicial standards, that is, the holdings of those cases which equate a punitive purpose with criminality, the civil penalties statute would be sustained as part of an administrative regulatory scheme which is remedial in nature. Certainly, then, it is a fortiori that the statute and regulations pass muster under the broader standard stated in Roberge.

IV. The Statute Is Civil in Nature Because It Provides For Compensation To the State and the Public.

If a statutory scheme is aimed at providing compensation for losses incurred then it is not criminal in nature. See discussion in Section I, supra. The amount of the penalty need not be exactly coextensive with the harm suffered. Walsh v. Gurman, 132 Conn. 58 (1945). Statutory penalties "may be...compensatory in their nature, although they embrace injuries or expenses not included in strict legal damages". Banks v. Watrous, 134 Conn. 592 (1948). See also Doran v. Rugg, 22 Conn. Sup. 189 (1960).

A number of U.S. Supreme Court cases support the contention that one purpose of the civil penalties statute is compensation to the State of Connecticut. In Helvering v. Mitchell, 303 U.S. 391 (1938), the

Court upheld a 50% tax surcharge for civil tax fraud as non-criminal. The major reason for finding the proceeding civil in nature was that "[the sanctions imposing additions to a tax] are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud". In Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956), the Government attempted to recover civil penalties after defendant had been fined under a criminal charge concerning the same activity. Defendant's invocation of the double jeopardy clause was rejected: the second recovery is civil in nature and not an attempt to punish defendant again for the same acts. The civil penalty is in the nature of liquidated damages for losses incurred by the Government. The damages resulting from the injuries suffered by the Government "may be difficult or impossible to ascertain" but the penalty provision acts as a substitute for such a calculation.

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) presented the civil/criminal issue once again in the context of a claimed protection under the double jeopardy clause. The Court held that penalties incurred for defrauding the Government were non-criminal because they were compensatory. It cited Helvering v. Mitchell, supra, as emphasizing "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." The present action was remedial because "we cannot say that the remedy now before us requiring payment of a lump sum and double damages will do no more than afford the government complete indemnity for injuries done it." See also One Lot Emerald Cut Stone and

One Ring v. United States, 409 U.S. 232 (1972).

The approach taken in Helvering v. Mitchell, Rex Trailer, Marcus v. Hess, and Emerald Cut Stones has been expanded and explained in lower courts. In United States v. 254 U.S. Twenty Dollar Gold Coins, 355 F. Supp. 298 (E.D. Mich. 1973), the Court stated that one of the primary criteria for testing the criminality of the forfeiture provision was whether the forfeiture served to reimburse the Government for investigative and enforcement expenses. Contra, see McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971). In Bowles v. Berard, 57 F. Suppl. 94 (E.D. Wisc. 1944), the Court held a suit for treble damages by the Administrator of the Office of Price Administration for a violation of price controls civil in nature. The Administrator represents the public at large. All members of the public are damaged by inflation. In addition, the Government itself, as the purchaser of commodities, is directly damaged by each unauthorized price inflation. Therefore the action is remedial and not penal in nature. Contra, see Bowles v. Trowbridge, 60 F. Supp. 48 (N.D. Calif. 1945).

The compensation standard was fully relied upon in United States v. Alcatex, Inc., 328 F. Supp. 129 (S.D.N.Y. 1971), where the Government sued for a forfeiture under the Trading With the Enemy Act, the forfeiture being a monetary penalty equal to the value of the illegally imported goods. The Court held that the action was civil in nature and rejected a double jeopardy claim by defendants. The Government in cases like this "may fairly be presumed to have suffered injury." These injuries include, first, the heavy expense of investigating, monitoring and prosecuting alleged lawbreakers. "It is understandable, and by no means unjust, for Congress to decide that when lawbreakers are caught they should help to defray the enforcement expenses." Second, the Government suffers the injury of having its trade, economic and foreign policies frustrated or impeded. This kind of damage, still real though impossible to measure, **is similar in character to that discussed in Rex Trailer** -- to make sure the Government would be made completely whole. "The remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered."

The civil penalties statute meets this articulated requirement of a compensatory purpose for a penalty to be civil in nature. First, the same kinds of investigative and enforcement expenses that were incurred and relied upon in Helvering v. Mitchell, One Lot Emerald Cut Stones, 254 U.S. Twenty Dollar Gold Coins, and Alcatex, supra are extant in the present situation and incurred by the Department of Environmental Protection. Second, the damage suffered by the public and sued for by the State on behalf of the public is present here as well, just as it was in Berard, supra. In fact, the present case is even more apt than Berard with respect to the need for governmental action on behalf of the public because here there is no injured party that can bring suit. Thus, the fact that it is public goods (the environment) that are the object of protection makes the stance of the State suing on behalf of the public for damages suffered essential. Third, the damage suffered by the Government in terms of interference with, and frustration of, valid governmental policies that was relied on in Alcatex is certainly a major factor here. There is no doubt that the valid State policy of protecting the environment is frustrated and impeded by those who refuse to come into compliance with the relevant standards or laws. And fourth, the statute itself makes clear the compensatory role of civil penalties. Section one of the Act provides for the recovery of damages by the State for injuries to the environment. But section one cannot, by its own terms, be utilized if civil penalties under section two are also to be imposed. Thus, the clearly compensatory section is viewed as interchangeable with the civil penalties section. The General Assembly has simply allowed the Department some discretion in choosing its mode of remedy, and has further allowed the Department discretion in formulating the exact method for utilizing civil penalties. It is only necessary that one aspect of the penalties be compensatory, and not necessary that the size of the penalty equal the damage suffered. See United States ex rel. Marcus v. Hess, supra. And, of course, the guidelines for setting the size of civil penalties reflect a great concern for compensating damage suffered. See sections 2(c)(2), 2(c)(6), 2(c)(7) of the statute.

Thus, for a number of reasons, and in the same fashion as has been articulated in the controlling judicial precedent, the civil penalties statute and regulations are compensatory in nature and therefore do, in fact, provide for civil penalties.

V. The Statute Is Civil in Nature Because This Was the Clear Intent of the General Assembly

In Kennedy v. Mendoza-Martinez, supra, the Court looked first to the intent of the legislature and thereafter to its list of seven factors in order to determine whether a statutory provision was civil or criminal in nature. This same view was expressed in Helvering v. Mitchell, supra, where the Court relied to some extent on Congress' use of the words "by distraint" and "by a proceeding in court" to find that "Congress provided a distinctly civil procedure for the collection of the additional 50 per centum" and that this indicated a clear civil intent, rather than a criminal sanction. In United States v. Regan, 232 U.S. 37 (1914), the Court relied in part on the use of the words "sued for and recovered" and "as debts of like amount are now recovered in courts of the United States" as evidence of plain contemplation of a civil action. The Court in United States v. Norfolk, Baltimore and Caroline Line, Inc., 382 F.2d 208 (4th Cir. 1967), declared that the civil/criminal distinction was a question of statutory construction and that the use of the word "civil" in a legislative report indicated that the proceedings were civil in nature. In United States v. J.B. Williams Co., Inc., 498 F.2d 414 (2d Cir. 1974), the Court stated that "when Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word". And in Olshausen v. Commissioner, 273 F.2d 23 (9th Cir. 1959), the Court stated that "it has long been settled that Congress may provide civil proceedings for the collection of penalties which are civil or remedial sanctions rather than punitive, and provide that the determination of facts upon which the liability for such a penalty is based may be by executive officers or administrative agencies". See also United States v. Lebeouf Brothers Towing Co., Inc., Civ. Action No. 73-915 (E.D. La. 1974); Telephone News System, Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621 (N.D. Ill. 1963); United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972).

The legislative intent behind the civil penalties statute, as revealed in both drafting and legislative debates, is clearly a desire for a civil proceeding. First, the penalties are called "civil penalties." This has some import, as can be seen in Caroline Line, supra.

Second, the commissioner is directed to determine the size of a civil penalty. This indicates a clear "civil intent" because it is not possible for an administrative officer to adjudicate the criminal law.

Third, the penalty can become effective without a hearing if defendant waives this right by simply not responding for 20 days [see Section 2(e) of the statute]. This procedure would be patently illegal if criminal penalties were intended.

Fourth, the civil penalty assessed in a final order is to be enforced in the same manner as a judgment of the Superior Court. This is a civil procedure for collecting judgments.

Fifth, Representative Wagner, dicussing the statute during the House debate on May 23, 1973 stated that "this bill decriminalizes these statutes, and makes it a civil thing, rather than a criminal statute."

Sixth, both Represenative Wagner in the House debate and Senator Costello in the Senate debate on May 15, 1973 emphasized the regulatory purpose of the statute. Represenative Wagner: "Presently the procedures existent and available to the Commissioner are unfair to most companies.... [A] company may comply with an order to abate pollution by making a capital expenditure, where another company may not, save the capital expenditure, and tie the matter up in the Courts." Senator Costello: "We...want to protect the businessman who is honestly complying."

For all of these reasons, the intent of the General Assembly was undoubtedly to create a penalty which was wholly civil in nature.

VI. The Statute is Civil in Nature Under the Mendoza-Martinez Standards.

These penalties do (1) involve an affirmative disability, to wit, the payment of a monetary sum. This is no more a disability than the payment of money damages, and much less a disability than license suspension or revocation, all of which are civil remedies. Thus, payment of money has not (2) historically been regarded as punishment, and many cases find penalties non-punitive. See Helvering v. Mitchell; Rex Trailer; U.S. ex rel. Marcus v. Hess; Emerald Cut Stones; Alcatex; U.S. v. Zucker; Huntington v. Attril; Hepner v. U.S.; U.S. v. Childs; Plumb v. Griffin; Lamphear v. Buckingham; etc. The civil penalties provided under the present statute and regulations do not (3) come into play only upon a finding of scienter. The operation of the penalties is purely regulatory, the regulations allowing for a mandatory waiver of all penalties [§ 602(g)(4)] for the cooperative source. Therefore they do not (4) promote the traditional aims of punishment: retribution and deterrence. The behavior to which the penalties apply is not, generally, (5) already a crime. There are (6) a number of alternative purposes for the statute aside from punishment. These include both the financial protection of sources that spend money to comply with the law, and the general protection of the environment. And finally, the penalty is calculated so that it never is (7) excessive in relation to the alternative purpose assigned. In fact, the regulations provide for a method of determining the size of a penalty that is attuned directly to equalizing the advantages gained by the non-compliance and ensuring immediate and effective compliance with the law, thus enhancing the environmental surroundings.

Thus, under the Mendoza-Martinez standards discussed in § II, *supra*, the civil penalty statute and regulations qualify as civil proceedings rather than criminal prosecutions and would be sustained over a challenge that they are criminal in nature.

THE CIVIL/CRIMINAL DISTINCTION (II)

This memo reiterates the general conclusion of the previous memo and in addition examines the brief history of the civil/criminal distinction in Connecticut.

Two nineteenth century statutes entailing enforced detention were characterized as civil in nature. The first provided for the detainment of a negligent master for the purpose of reconciling him with his apprentice, and the second required a period of forced labor for delinquent taxpayers. In both instances, the courts found that punishment was not the primary goal.

In a later case, the claim was made that a statute authorizing recovery of damages caused by a defective road or bridge was criminal, not civil. The court rejected the claim, but held that the test for criminality was whether the wrong sought to be redressed was a wrong to the public or to an individual.

And in a very recent case, a lower Connecticut court examined a statute which mandated a $5,000 "civil penalty" for violation of the State Anti-Trust Act. While deciding the case on different grounds, the court implied that the section in question would probably be termed "criminal" despite the label of the General Assembly. It should be noted, however, that this provision had none of the remedial or compensatory characteristics of the civil assessment regulations.

TO: Glen Gross, David Tundermann
FROM: David Rivers
RE: Civil Penalties

Issue: Is a monetary penalty, as contemplated in P.A. 73-655, a criminal penalty?

DISCUSSION: (A) The available case law concerning the civil/criminal penalty dichotomy is far from uniform. In large part this is due to the many different types of civil penalties that have been utilized. Besides monetary fines civil penalties include such acts as revocation, suspension and non-renewal of licenses, withdrawal of privileges of contracting with the government, forfeitures of money or property and divesting of citizenship.1/ To find a workable definition of civil penalty, cases concerning all of these must be drawn on. Moreover, courts often classify penalties as civil or criminal with no real indication as to how the determination was made. In Lees v. U.S., 150 U.S. 476,37L.Ed.1150(1893) an action to impose a penalty (for importing an alien under a contract to perform labor) the penalty was found to be "unquestionably criminal," but no clear reason for the decision was given.

On the opposite side, the court in American Smelting and Refining Co. v. Occupational Safety and Health Review Commission, No. 73-1721, U.S. Ct. of App., 8th Cir., filed July 15, 1974, dismissed the issue of whether a $600 penalty,1/ for failure to comply with OSHA of 1970, was criminal with one line. "Civil penalties are not uncommon in federal law, and Congress here clearly intended to create a civil sanction." What is clear, however, is that the way the penalty statute is characterized on the surface will not be enough to sustain it as civil. As Chief Justice Warren warned, "the inquiry must be directed at substance" not labels, Trop v. Dulles, 356 U.S. 86,93 (1957).

The correct method in penalty cases should be to decide first whether the penalty is civil or criminal. Only if it is found to be criminal is it necessary to decide the secondary issue of whether constitutional rights of criminal procedure were safeguarded. If the penalty was determined to be civil, no such rights would attach. Courts, however, have confused this reasoning process, particularly where some statutory peculiarity is involved. In two similar cases, U.S. v. Tank Barge CTCO Corp., No. 72-H-1443, U.S. Dist. Ct., S-D. of Texas, March 21, 1974

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1 For discussion of types of penalties see Davis, Administrative Law, Section 2.13.

2 Assessed pursuant to 29USC Section 666(b).

and U.S. v. Lebeouf Bros. Towing Co., No. 73-915, Section "I," U.S. Dist. Ct., E.D. of La., June 14, 1974, pecuniary penalties were found to be criminal. Both cases involved statutes concerning discharges of oil or gas into waterways.3/ In each case it was sought to impose a monetary penalty. Violators of the statute, however, were required to report, under threat of criminal sanctions for failure to do so, any spillages. Once reported the monetary penalty could be invoked. Both courts found the penalty to be criminal on the basis of this "self-disclosure" provision.

"Self-disclosure" (self-incrimination), however, should not be used as a criterion in determining whether a penalty is civil or criminal, but rather it should only be considered after that determination is made. (the Tank Barge court recognized that its conclusion should be limited to the peculiar situation involved, and not to civil penalties generally, supra at 11).

In addition, care must be taken when attempting to apply federal decisions to state laws, since statutes imposing penalties may be found to rest on particular authority, such as Congress' absolute power over interstate commerce. (See Antonima Per Anzioni v. Elting, 287 U.S. 329 (1932); U.S. v. Wrightwood Dairy Co., 315 U.S. 110.

(B) Despite the confusing case law, certain guidelines or "tests" may be found. Kennedy v. Mendoza-Martinez 372 U.S. 144 168, (1962) (involving divesting of citizenship under the Armed Forces Nationality Act of 1940, 58 Stat. 746) sets forth the traditional test applied to determine whether a statute is criminal or regulatory as:

(1) whether the sanction involves an affirmative disability or restraint

(2) whether it has historically been regarded as a punishment

(3) whether it comes into play only on a finding of scienter

(4) whether its operation will promote the traditional aims of punishment-retribution and deterrence

(5) whether the behavior to which it applies is already a crime

(6) whether an alternative purpose to which it may rationally be connected is assignable for it

(7) whether it appears excessive in relation to the alternative purpose assigned.

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3 Rivers and Harbors Appropriation Act of 1899 (33USC Section 407 et. seq.), Federal Water Pollution Control Act (33USC Section 1151 et. seq.)

The court admitted that the problem is extremely difficult and the solution elusive and that, when applied, the tests often point in differing directions. The court itself did not even attempt to apply the tests here, merely saying the punitive nature was "evident."

The Supreme Court has also stated that the criminal/civil determination should be made by looking to the legislative purpose:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment--that is, to reprimand the wrongdoer, to deter others, etc.--it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felony. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voters, this law is sustained as a non-penal exercise of the power to regulate the franchise. Tropp v. Dulles, supra, 96, 97.

Similar reasoning--looking to the purpose behind the statute--was applied in U.S. v. Futura Inc., 339 F. Supp. 162 (1972), concerning a violation of the Economic Stabilization Act of 1970 for charging rents in excess of the allowable ceiling. The section involved provided "whoever willfully violates any order or regulation under this title shall be fined not more than $5,000." The court stated that the test most often articulated in determining if a penalty is civil or criminal is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question. The court applied this punitive vs. regulatory test as well as the Kennedy v. Mendoza-Martinez test, supra, and found that the penalty in question did not involve an affirmative disability or restraint, that a fine is traditionally regarded as criminal punishment, that violation of the act was predicated on a showing or finding of scienter, that it promoted the traditional aims of punishments-retribution and deterrence, and was therefore penal, not civil. See also, U.S. v. U.S. Coin and Currency, 401 U.S. 715,28 L. Ed. 2d 434 (1970), U.S. v. Krapf, 18 F. Supp. 886 (1960), concerning punishment as a criterion in determining whether a penalty is criminal.

(C) A criterion often used in upholding civil penalties, and of particular importance where monetary fines are involved, is that the penalty be remedial. As a concept it is closely akin to the principle in tort and contract law of "Making the Plaintiff Whole." Thus, in cases arising under tax law, penalties are upheld as being remedial sanctions aimed at protection of the revenue and reimbursing the government for the expense of investigation, see e.g. Helvering v. Mitchell, 303 U.S. 391 (1937), Alshausen v. Comm'r of Internal Revenue, 273 F 2d 23 (9th Cir., 1960). To be remedial, a penalty should function as reimbursement for expenses and restitution for damages, U.S. v. Lebeouf Bros. Towing Co., supra. Although not articulated in the cases, it would seem that arguments in favor of a penalty being remedial in nature would be enhanced if the penalty imposed approximated as closely as possible real losses in terms of agency expenses and damage to the environment. Thus, care should be taken in assessing each individual penalty.4/ Likewise, if a penalty is to be considered remedial, it should be applied to all violations, and not used as a "bargaining tool," since to do so could negate the restitution theory. At least one case, however, upheld a forfeiture penalty as being remedial even "...though the loss is ordinarily unascertainable," Colaccico v. U.S., 143 F 2d, 410, (2d Cir., 1944). Where the sanction is truly remedial, it does not matter that the act giving rise to the penalty may also give rise to a criminal sanction, Helvering v. Mitchell, supra, or that there may also be some punitive element involved, Colaccico v. U.S., supra.

(D) One recent case, based on a statutory provision similar to that found in P.A. 73-665, illustrates the more forward looking view toward administrative civil penalties. Ford v. Environmental Protection Agency, 292 NE 2d. 540, involved the Illinois Environmental Control Act (ILL. Rev. Stat. 1971, Ch. 111 1/2. The Act provided for imposition of a penalty not to exceed $10,000 and an additional penalty not to exceed $1,000 for each day of violation, for violations of the Act or regulations adopted under it. The penalty was challenged as being criminal. In upholding the provision, the court said (pages 54 ff.):

> As we view the Act before us in this case, we conclude that it is to be construed as evidencing that a civil sanction was intended. No mention of crime or criminal prosecution is made in the Act, and...the legislature has provided for a distinctly civil procedure for the collection of the penalties imposed, thus manifesting its intent that the penalties authorized are civil sanctions...Administrative impositions of penalties are

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4 There are cases however holding it unconstitutional to authorize an administrative agency to determine the amount of individual fines; e.g. Tite v. State Tax Comm'er, 89 Utah 404.

> common within the State and Federal government structures... [T] he principle emerging...is that an administrative officer or agency may penalize, without offending the Constitution, when the penal function is incidental to the duty of administering the law..[T]he legislature may grant to the body charged with the duty of administering a law such authority and powers as are necessary for the "practical application and operation of the law".....Specifically it is our conclusion that the penalty powers given the Pollution Control Board are incidental to its duties of administering the law, and, as such, are quasi-judicial powers which fall outside the prohibition of the Constitution.5/

(E) Connecticut law on the civil/criminal penalty question is not well enough developed to allow for predictions as to how the state's courts would handle the issue. In an early case, Fenn v. Bancroft, 49 Conn. 216 (1881), the court was faced with a statute which allowed for imprisonment of a master for abuse or negligence toward an apprentice. The court found that the object of the statute was to reconcile the parties, that the end and object of the statute determines its character, and that, therefore this was a civil action, rather than criminal. It was stated that, "No warrant is provided for, no arrest, and a forthwith process is not required... There is no public wrong to be punished, no fine and no imprisonment." (The imprisonment involved in the case was not a sentence, but rather a detention of the master for reconciliation of the difficulties.)

A later case involved a statute which allowed for a complaint and the arrest of delinquent taxpayers. The statute provided that the taxpayer could be jailed, where he would be paid for his labor, until the delinquency was worked off (not a criminal sentence). Again, even though jailing was involved, it was held to be a civil statute, the court saying that the purpose was not punishment, that it provided for no fine or imprisonment, that delinquency was not a public wrong, that nothing in the act indicated an intent to make non-payment of tax a crime, and that the purpose was to provide an additional proceeding for payment of the tax.

In Porpora v. New Haven, 122 Conn. 80 (1936) the claim was made that statutes authorizing the recovery of damages caused by defective roads and bridges was penal. In upholding the statute as civil, the court stated, that strictly and primarily the words "penal" and "penalty" denote punishment, whether corporal or pecuniary, imposed or enforced by the State for a crime or offence against the laws. "The test of whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." Significantly, the court found that the purpose of the statute was to furnish a remedy for the injured party.

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5 The case includes extensive discussion of the related issue of delegation of judicial functions to administrative agencies.

An indication of how Connecticut's courts might handle the civil penalty issue today might be taken from a recent lower court case, *Mobil Oil Corp. v. Killian*, 30 Conn. Supp. 87, 301 A 2d 562 (1973), an action to quash a *subpoena duces tecum* under the State Anti-Trust Act. Chap. 624, C.G.S. Section 35-38 of the Act reads:

> *Civil penalties for violations*. In any action instituted by the attorney general, any individual who has been held to have violated this chapter shall forfeit and pay to the state a civil penalty of not more than five thousand dollars.

The court declined to rule on Section 35-38, since no attempt had been made to impose a civil penalty and since the validity of that section would not vitiate the remainder of the act.

The court did state, however, that the legislature could not confer the power of criminal prosecution on the attorney general because of the separation of powers doctrine in Article 2 of the state constitution and, citing *State v. Hall*, *supra*, said that whether a case is a criminal one is not determined from form of complaint and process alone. The court ruled that "*but for the possible exception of Section 35-38*" the Anti-Trust Act must be construed as a civil statute whose dominating characteristic is to provide a means of civil redress as well as investigatory tools for use by the Attorney General. (Emphasis added). The tone of the decision indicates that had the issue been decided, the penalty section, Section 35-38, would have been found to be criminal.

CONCLUSION: To be upheld as civil rather than criminal, a monetary penalty should have some rational connection to a valid regulatory scheme. In form and in application it should not be punitive. The amount of the assessment should, as closely as possible, approximate real loss or damage. In Connecticut, however, this may not be enough.

SELF-INCRIMINATION (I)

The Fifth Amendment privilege against self-incrimination may be invoked only by individuals who incur a "real and appreciable" liability to criminal prosecution on account of the disclosure.

This protection applies not only to criminal proceedings but to technically civil actions which may be designated "quasi-criminal" in nature. The Department can probably resist this characterization of its civil assessment hearings on two grounds: the legislature intended the actions to be civil, and there is no requirement of proof of a cuplable mental state to establish liability.

Even if the proceedings are neither criminal nor "quasi-criminal," the privilege may be invoked if the information obtained is likely to lead to criminal prosecution in a future proceeding. Since there are state and federal criminal laws covering several acts for which civil assessments may be imposed, the privilege may apply in certain cases.

Where records are required to be kept by law, however, the Fifth Amendment privilege may not be applicable. The recent trend of Supreme Court decisions suggests that all the record keeping requirements established by the Commissioner may be exempted from the protection of the privilege so long as they serve the valid regulatory purposes of the agency and are not designed or used to funnel incriminating evidence to prosecutors.

Self-Incrimination

Topics Covered

I Use of Right Against Self-Incrimination, Generally

II Use of the Right Against Self-Incrimination to Avoid a Civil Penalty

III Use of the Right Against Self-Incrimination in Avoidance

IV Use of the Right Against Self-Incrimination to Avoid a Criminal Penalty

I General Use

There are two sources of immunity from self-incrimination. One is the 5th Amendment of the Constitution of the U.S.: "No person...shall be compelled in any criminal case to be a witness against himself." The second is any statutory immunity granted by an appropriate legislature.

In "pleading the Fifth," one must stand ready to establish that there is a "real and appreciable risk or hazard" of self-incrimination; Leary v. U.S., 395 U.S. 6 (1969), or that such use is not an "extreme or extravagant application" of the privilege. Marchetti v. U.S., 88 S. Ct. 697 (1968).

As interpreted by the courts the 5th Amendment right is only available to individuals and not incorporated or non-incorporated businesses:

> The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed and whether they had been abuses, and demand the production of corporate books and papers for that purpose.
> Hale v. Henkel, 201 U.S. 43 (1966). See. George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).

Yet, the 4th Amendment right to protection from unreasonable search and seizure does apply and necessity must be shown for a corporation to incriminate itself through its books:

> In view of the power of Congress over interstate commerce (in our case of General Assembly over the public trust in the environment) to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress (General Assembly), would constitute an unreasonable search and seizure under the 4th Amendment.
> Hale v. Henkel, supra, at 77. (parenthetical analogies added); Boyd v. U.S., 116 U.S. 616, 623.

The principle preventing use of the right against self-incrimination

> Not only applies to public documents...but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.
> Shapiro v. U.S., 335 U.S. 1, 17 (1948); quoting from Wilson v. U.S., 221 U.S. 361 (1911).

Business records kept under requirement of law by private individuals in unincorporated enterprises are public documents for purposes of the 5th and 4th Amendments. State v. Donovan, 10 N. Dak. 203; State v. Davis, 69 S.E. Rpt. (W. Va.) 639; People v. Coombs, 158 N.Y. 532; State v. Cummins, 76 Iowa 133; L & N RR Co. v. Commonwealth, 51 S.W. Rep. (Ky.) 167; People v. Henwood, 123 Mich. 317; State v. Smith, 74 Iowa 580; Langdor v. People, 133 Ill. 382; all cited approvingly in Wilson v. U.S., 221 U.S. 361 (1911). See appendix.

5th Amendment rights are available to businesses when expressly granted by an appropriate legislature. Individuals have rights against self-incrimination only in criminal prosecutions from the 5th Amendment. There must be a statutory grant of immunity for an individual or business to plead a right against self-incrimination in a civil action. C.f. Le Beouf Case E.D. La. C.A. #73-915.

II Self-Incrimination and Civil Penalties

Unless there is some special provision for statutory immunity, which is not the case in Connecticut environmental law, there is no right against self-incrimination in a civil case.

> Considering the declared purposes of the Act and the interest of the government in its enforcement, an action for the imposition of the sanctions authorized is remedial and not penal in nature, and the immunity granted by the 5th Amendment does not come into play.
> Amato v. Porter, 157 F. 2d 719 (2nd Cir. 1946), an action for treble damages for violation of maximum price regulations.

In Woods v. Robb, 171 F. 2d 539 at 541, when a party claimed that "He could not in a penalty suit be required to testify against himself" the court replied,

> Nor was this such a suit that the (self-incrimination)...excuse would fit. The suit involves only civil sanctions, imposed as deterents rather than punishments...admissions if made could not have been used against him in any other proceeding.
> Rule 36(b).

The true problem comes in the distinction between criminal and civil penalties:

> This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself.
> Lees v. U.S., 150 U.S. 476, 480 (a case dealing with collector of penalties for introductory foreign labor contrary to immigration laws).
>
> A proceeding to forfeit a person's goods for an offense against the law, though civil in form, and whether in rem or in personam is a 'criminal case' within the meaning of that part of the 5th Amendment which declares that no person 'Shall be compelled in any criminal cases to be a witness against himself...(Here the forfeiture of goods could have been included in a criminal judgment) ...If the government prosecutor elects to waive an indictment and file a civil information against the claimants--that is, civil in form--can he deprive the claimants of their immunities...? This cannot be.
> Boyd v. U.S., 116 U.S. 616, 634 (1889), (action for forfeiture of illegal importations).

III Use of Right Against Self-Incrimination in Avoidance of a Criminal Sanction as a Defense to a Civil Penalty

The 5th Amendment right can be used as a right "not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." Leary v. U.S., 395 U.S. 6.

> [A] civil penalty can not be exacted where defendant failed to comply with law to avoid self-incrimination on criminal charges.
> Grosso v. U.S., 88 S. Ct. 709 (a case involving civil prosecution for penalty for failure to pay gambling tax in a state where gambling was illegal).
>
> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon who are significantly involved in criminal enterprises. It follows from Boyd, Marchetti (88 S. Ct. 697) and Gross that the

> Fifth Amendment privilege may properly be invoked in these proceedings.
> U.S. v. U.S. Coin and Currency, 401 U.S. 715 (1971).

These quotes point up the apparent dangers in having both a criminal and civil penalty for the same illegal act. Moreover, they show that courts will block civil penalty awards when an individual fails to comply with the law in order to prevent self-incrimination and criminal prosecution under another law. Query whether this is not the case of a civil penalty for failure to keep emission records which would expose a pollution condition subject to criminal prosecution.

IV The Right Against Self-Incrimination and a Criminal Penalty

To reiterate for emphasis a private individual always has the 5th Amendment to use in criminal cases, a corporation does not, and any form of public business required to keep records does not in relation to those records. Therefore, even in a criminal case, some parties may be prosecuted even though they "expose" themselves.

State v. Donovan -- Records kept by druggist as required by law were public records and not private records under the 5th Amendment protection.

People v. Coombs -- False coroners reports available against him. Public not private papers.

State v. Cummins -- Sales reports of pharmacist could be used against him.

State v. Davis (W. Va.) -- Druggist prescriptions are quasi "public documents" where state requires him to "file and preserve his 'private papers'" and are thus not protected.

L.N.R.R. Co. v. Commonwealth -- Tariff sheet posted as required by law is public and not private.

State v. Smith -- Records of druggist required to be submitted to county auditor thereby became public.

Langdon v. People -- A search warrant allowed certain papers incriminating forger to be obtained.

The two West citations were Shepardized.

Neither has been overruled.

Statutes which evoke potential self-incrimination issue.

Tidal Wetlands

22a-30	Right of entry.
22a-32	Permit filing.

Inland Wetlands - None.

Water Compliance

25-54a	Records
25-54dd	Report of oil spill
25-54ee	Liability for oil spill
25-54ff	Liability for removal of oil
25-38	Prison sentence of 30 days for carcass of animal willfully put in body of water.
25-39	Pollution of drinking H_2O - 6 months.
25-43	Bathing in reservoir - 30 days.
25-50	Penalties for polluting ice - 30 days.

Water Resources

25-4f	Regulations & procedures - self reporting reg. possible.
25-7f	Penalty for wrongfully erecting coastal structures and related activities - 10-30 days.
25-18	Wrongful dredging - 30 days.

Air Compliance

19-508	Self-Reporting procedures.
19-508a	Open air burning - 3 months.
19-516	Civil penalty for same offense as 19-508.

Solid Waste - None.

SELF-INCRIMINATION (II)

This memo reiterates the general principles of Fifth Amendment application:

(1) In pleading the Fifth Amendment, a party must establish that there is a "real and appreciable risk or hazard" of self-incrimination;

(2) The privilege is generally available only to individuals, not to incorporated or unincorporated businesses;

(3) There must be a statutory grant of immunity for a person (individual or business) to invoke the privilege in a civil action;

(4) In conjunction with the Fourth Amendment bar against unreasonable searches and seizures, there is a Fifth Amendment privilege against incrimination from corporate books. But this applies to private documents, not to those required to be kept by the General Assembly.

The privilege appears to have direct bearing on the civil assessment program only when an individual fails to comply with a civil statute mandating self-reporting in order to avoid self-incrimination and criminal prosecution under another law. Recent cases indicate that a civil assessment may not be exacted in this situation.

INTRODUCTIONS AND CONCLUSIONS

Statutory schemes which enable government officials to require the production of information that can be used to prove criminal violations by the people producing it may run afoul of the Fifth Amendment privilege against self-incrimination.* This problem may cause difficulties for the civil penalties program particularly in the water compliance area. There are state and federal criminal penalties for certain types of water pollution and the Department of Environmental Protection can force the production of certain kinds of information that might incriminate under these statutes. If a court found that information sought by the Department in a civil penalty case was protected by the privilege against self-incrimination it would bar the production of the evidence, overturn any judgment based on it and might overturn the information statute as unconstitutional.

This problem is limited to a small area, however. Only individuals (not corporations) can claim the Fifth Amendment privilege. Moreover, even individuals can be required to produce records "required by law to be kept in order that there may be suitable information about transactions which are the appropriate subjects of governmental regulation and the suitable enforcement of restrictions validly enforced" Shapiro v. U.S., 335 U.S. 1, 17 (1948). Finally, for information sought in a civil action to be privileged there must be a substantial likelihood that it will result in or support prosecution in a criminal action. Where there are no statutes or established administrative procedures by which such information passes to criminal prosecutors the courts have been reluctant to apply the privilege.

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*They may also contravene the Fourth Amendment protection against unreasonable searches and seizures, a subject only briefly touched on in this memorandum.

Analysis

The source of the privilege against self-incrimination is the Fifth Amendment to the U.S. Constitution which states that "no person...shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment applies only to the federal government. As a result of the Fourteenth Amendment the states must also respect the privilege and the same standards hold at the federal and state levels. Mallory v. Hogan, 378 U.S. 1 (1963).

The short constitutional statement upon which the privilege is based has given rise to a complex legal doctrine that can perhaps be best understood by looking at each facet of it in terms of present constitutional law.

No person......

The privilege against self-incrimination applies only to individuals or "natural persons." Such legal "persons" as corporations, labor unions, partnerships and other associations have been held to be outside the protection of this part of the Fifth Amendment.

> It has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is "essentially a personal one, applying only to natural individuals. It cannot be utilized by or on behalf of any organization, such as a corporation." U.S. v. White, 322 U.S. 649, 698-9 (1944) /labor union/; see also Essgee Co. v. U.S., 262 U.S. 151 (1923), Wilson v. U.S., 221 U.S. 361, 382-5

(1911); Hale v. Henkel, 201 U.S. 43, 74-5 (1906). Material in brackets added.

Campbell Printing Corp. v. Reid, 392 U.S. 286 (1968). See also U.S. v. Silverstein, 314 F. 2d 789 (1962) (2nd Cir.) cert den'd 374 U.S. 807 (1963) (partnership denied privilege).

Corporate officials are also denied the privilege against self-incrimination in certain cases. Corporate records may be used to incriminate corporate officials, even those who kept the records. Those officials are merely custodians of the records. U.S. v. White, supra, and Wilson v. U.S., supra. On the other hand, corporate officers have been allowed to refuse to answer interrogatories directed to the corporation even though the corporation has no privilege. U.S. v. Kordel, 397 U.S. 1, 7 (1969) and cases cited therein. Thus the courts have drawn a distinction between corporate records that might incriminate a corporate officer and an officer's unrecorded knowledge of his or her activities.

It should be noted that while corporations are not protected by the Fifth Amendment privilege against self-incrimination, they do appear to be protected by the Fourth Amendment's prohibition against unreasonable searches and seizures. Hale v. Henkel, 201 U.S. 43, 76 (1906). In that case the court held that a subpoena duces tecum issued to a corporation by a federal grand jury was so broad as to violate the corporation's Fourth Amendment rights. This subject is beyond the scope of this memorandum, but may warrant further investigation.

In addition there is another avenue by which corporations may escape the production of certain types of information. Some courts have held that statutes requiring the production of certain types of information by persons about the impact on the environment of their activities could not have intended that the information be used in criminal actions because that would discourage the production of the information. U.S. v. Republic Steel, 491 F. 2d 315 (1974) (6th Cir.). This question is beyond the scope of this memorandum, but will be discussed in a later one.

....shall be compelled...

The privilege against self-incrimination applies to involuntary production of information by the person who fears incrimination. The privilege can be waived by failure to claim it at the time the "testimony" is sought. U.S. v. Kordel, 397 U.S. 1 (1969), Sullivan v. U.S., 274 U.S. 259 (1927). The privilege is intended to protect individuals from being forced to divulge incriminating information about themselves. In Couch v. U.S., 409 U.S. 322 (1973), the court held that the privilege did not apply to personal records that had been placed in another person's custody and remained there for a long period of time. It reasoned that the privilege only applied where the compulsion of the state was exerted on the person likely to be incriminated. Where a person clearly relinquished custody of the information in a way that suggested an intention to give up control over it the government could compel the holder of the information to produce it.

...in any criminal case....

There are two questions of interest raised by this segment of the constitutional provision. The first is what qualifies as a criminal case. The second is whether the privilege can be claimed only in a proceeding of this type. The courts have used a rather broad definition of "criminal case" in applying the

Fifth Amendment privilege. They have extended its coverage to certain types of non-criminal cases that involve forfeitures of property or money penalties, labelling them quasi-criminal. However, there are crucial differences between the type of action that has been designated quasi-criminal and the civil penalty actions provided for by Section 2 of Public Act 73-665.* Even though the civil penalty actions are not quasi-criminal the privilege can still be claimed in them. The privilege against self-incrimination can be asserted in any sort of action, not only those criminal in form, so long as the information protected creates sufficient danger of incrimination in some proceeding. There are criminal penalties for some of the same acts for which civil penalties can be assessed, so the privilege can be asserted in civil penalty cases involving those acts by persons who qualify for its protection.

The courts have long held that certain civil proceedings are criminal in nature and that persons involved in those proceedings are entitled to the protection of the privilege against self-incrimination. These proceedings have been labelled quasi-criminal. The standards for determining whether a civil sanction is quasi-criminal are not clear cut. There is, however, one consideration that appears to be of paramount importance. Civil penalty actions have been labelled quasi-criminal by the Supreme Court in forfeiture cases where the acts giving rise to the forfeiture were also violations of criminal laws. Not only the physical act but also the mental state punished by the criminal provisions have been required for application of the forfeiture provision in the quasi-criminal cases. The premier early case in which the

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*If the civil penalty actions were found to be criminal and not civil or quasi-criminal, the privilege would apply. However, they would also in all probability be voided as an unconstitutional delegation of judicial power to an administrative agency. This broader question is discussed in another memorandum.

Fifth Amendment was upheld in a civil enforcement case was Boyd v. U.S., 116 U.S. 616 (1886). That case grew out of a forfeiture action brought under section 12 of the Act of June 22, 1874, 18 Stat. 186. The Act provided that anyone who "with intent to defraud" the revenue brought goods into this country under a false invoice or other paper or wilfully did any act or omission which deprived the United States of lawful customs revenues was liable for a fine and/or imprisonment and forfeiture of the goods in question. The defendant in a forfeiture action under this section was compelled, over objection, to produce the invoice which accompanied the imported goods to be forfeited pursuant to section 5 of the act. Section 5 mandated the production of such documents in non-criminal cases concerning fraud against the customs revenues. The U.S. Supreme Court overturned the judgment in the forfeiture action and declared section 5 unconstitutional and void. It held that the provision was repugnant to the Fourth Amendment protection against unreasonable searches and seizures and the Fifth Amendment privilege against self-incrimination.

The Court labelled the forfeiture action quasi-criminal. It based this ruling in large part on the fact that the elements of the forfeiture action were exactly the same as those giving rise to the criminal penalties in all respects.

> These fines, imprisonment and forfeiture are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment has been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment (116 U.S. at 634).

The forfeiture provision was set out in the same sentence as the criminal penalties in the act. The act provided that a violator "shall for each offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both, and in addition to such fine, such merchandise shall be forfeited" (116 U.S. at 617). Thus the forfeiture action was clearly a part of the punishment for criminal acts. The court did not conclude that the forfeiture action was a criminal action.* Instead it established a half-way case, civil in form but sufficiently criminal to activate the constitutional protections against unreasonable searches and seizures and involuntary self-incrimination.

In its decision in Boyd the court relied on Coffey v. U.S., 116 U.S. 436 (1886), in which it held that an acquittal in a criminal prosecution was a bar to a civil action for forfeiture based on the same acts. In that case as in Boyd the same acts and intent were required to establish both the forfeiture case and the criminal case. (See 116 U.S. at 442, 443) Thus, the type of civil penalty first labelled quasi-criminal by the court was one in which the acts punished also were violations of criminal laws. See also Lees v. U.S., 150 U.S. 476 (1893) in which the Supreme Court again held a civil penalty provision to be quasi-criminal and overturned a judgment for the government in a case in which a defendant was compelled to testify against himself. In this case, the United States obtained a judgment against Lees for $1,000 "as a forfeit and penalty" for a violation of an act prohibiting the "importation and migration of foreigners and aliens under contract or agreement to perform labor" in the United States. (150 U.S. at 478) The act also provided for a criminal proceeding to recover a fine of like amount. The court reversed the judgment because Lees had been compelled to testify against himself on trial.

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*If it had been a criminal action, the statute would not have allowed the U.S. to compel production of the document.

The doctrine established in Boyd has unquestioned vitality today. In U.S. v. U.S. Coin and Currency, 401 U.S. 715 (1971) the Supreme Court reaffirmed the Boyd rule. This case was an action for forfeiture of money used in violation of federal anti-gambling statutes. The money had been found in the possession of a person arrested for and convicted of violating federal laws requiring gamblers to register and pay a tax. These laws had subsequently been held unconstitutional as applied to persons such as this one who properly asserted "their privilege against self-incrimination as a ground for their failure to comply with...the gambling tax law," 401 U.S. at 716, 717. Marchetti v. U.S., 390 U.S. 39 (1968) and Grosso v. U.S., 390 U.S. 62 (1968). The government argued that the forfeiture proceeding was not barred because it was directed not at any person but at the money involved and that it would succeed whether or not that person was guilty of criminal violations. The court rejected that argument because federal law provided for individuals innocent of criminal acts to recover from the government forfeited property.

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows from Boyd, Marchetti, and Grosso that the Fifth Amendment's privilege may properly be invoked in these proceedings. 401 U.S. at 721, 722.

Thus, the Fifth Amendment protection against self-incrimination applies to civil penalty actions (forfeitures) aimed at acts that violate all the elements of criminal laws.*

While Boyd lives on, it has not been extended to areas beyond its original facts.** In a number of cases over the decades since Boyd, defendants in civil penalty actions sought the protection of some constitutional safeguard for criminal defendants other than the privilege against self-incrimination or the protection against unreasonable searches and relied on Boyd. In each case the court distinguished Boyd. It relied on several factors. One is whether the statutory language is of the type normally associated with civil or criminal actions. Another is whether the penalty is remedial and related to the enforcement of a valid regulatory scheme or punitive. Another is the difference in breadth of the protection claimed from that of the privilege against self-incrimination. Finally, the Court has also relied on the fact that in some cases the acts giving rise to the civil penalties, unlike those in Boyd, included some, but not all, elements of criminal offenses.

Hepner v. U.S., 213 U.S. 103 (1909) was an action to recover a statutory penalty (Act of March 3, 1903, 32 Stat. 1213, 1214, c. 1012) for unlawfully assisting the immigration of aliens who had signed labor contracts. The question at issue was whether the trial court could direct a verdict because undisputed testimony established a violation of the statute. The Court held that the action was basically civil and that the court could direct a verdict. In reaching its decision on the civil nature of the action the Court stated that a "certain sum or one which can readily be reduced to certainty," that is a penalty for violation of a law, "may be recovered in a civil action even if it may also be enforced in a criminal proceeding unless the statute clearly indicates that only a criminal recovery is possible." 213 U.S. at 108. Because the statute described the proceeding to recover the penalty in terms generally used with civil proceedings (the penalty amount could be "sued for," it was referred to as a debt, the proceeding was referred to as an action, 213 U.S. at 109), the Court determined that it did not mandate a criminal proceeding.

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*See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). This was another forfeiture case in which the act penalized included the intent necessary to violate criminal law. Here the Supreme Court held that the defendant was entitled to the Fourth Amendment protection against unreasonable searches and seizures.

**This is a limited foray into an area covered more thoroughly in the memorandum on the distinctions between civil and criminal penalties.

In U.S. v. Regan, 232 U.S. 37 (1914) the Court was confronted with the question of the standard of proof in cases under an amended version of the act involved in Hepner. One seemingly important amendment was the inclusion in the statute of the statement that violation of the act "shall be a misdemeanor." 232 U.S. at 40. The court discussed cases, including Hepner, in which constitutional protection for criminal defendants was denied to defendants in assessing civil penalties for acts for which criminal penalties were also possible. The Court then looked to the statutory language which described the action in terms generally used concerning civil actions (232 U.S. at 48) and determined that the proceeding was civil and the standard of proof was a reasonable preponderance of the proof and not proof beyond a reasonable doubt. Boyd and Lees were distinguished because the "guaranty...against compulsory self-incrimination... is of broader scope than are the guarantees in Article III and the Sixth Amendment governing trials in criminal prosecutions." 232 U.S. at 50.

In Helvering v. Mitchell, 303 U.S. 391 (1938) the court held that action for a 50% penalty for fraudulent understatement of tax liability was civil in nature and did not give rise to double jeopardy where the defendant had been acquitted of a criminal charge based on the same acts.

The court introduced a distinction between remedial and punitive sanctions. It held that the 50% add-on was "provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (303 U.S. at 401) It noted that penalties had long been collected civilly and that constitutional guarantees governing the trial of criminal prosecutions did not apply. (303 U.S. at 402-404) Boyd and Lees were distinguished using the argument from Regan that the privilege against self-incrimination is broader in scope than the protection of Article III and the Sixth Amendment. (303 U.S. 400, n.3.) Helvering v. Mitchell also laid the ground work for the limitation of quasi-criminal status to civil penalties for complete violations of the criminal law. In a dictum it noted that the degree of proof required for a criminal action (proof of intent) was not required for assessment of the 50% penalty and that this distinguished the case from Coffey v. U.S., supra.

In U.S. ex rel Marcus v. Hess, 317 U.S. 537 (1943) the court held that a qui tam action for recovery of money obtained from the U.S. was civil. It relied primarily on the remedial/punitive distinction laid out in Helvering. The statute providing for the qui tam action also set out criminal penalties. The defendants in a qui tam action had earlier been convicted of criminal violations and fined. The court held that there was no double jeopardy problem. The qui tam proceedings were said to be remedial and civil in spite of the fact that the recovery was more than twice the actual damage and the statute used the language "forfeit and pay." (317 U.S. at 548-551) In drawing this distinction the Court noted that the size of the penalty in question (double damages plus $2000) was not clearly in excess of the actual loss and expense of the government and therefore was not punitive. It also noted that the "words 'forfeit and pay' are wholly consistent with a civil action for damages" (317 U.S. 550, 551).

The third standard for distinguishing Boyd from other civil penalty cases is found in One Lot Emerald Cut Stones v. U.S., 409 U.S. 232 (1972). This case involved a forfeiture proceeding against one who had been acquitted of criminal charges for bringing certain jewelry into the country without submitting to the required customs procedures. The Supreme Court held that neither collateral estoppel nor double jeopardy barred the forfeiture action. There was no collateral estoppel because the criminal action might have been defeated because of a failure to prove the requisite intent, while no showing of intent was necessary to prove the civil case. There was no double jeopardy problem because the forfeiture was a civil sanction. It was said to provide a reasonable form of liquidated damages to the government, although it was only tenuously related to the loss in customs revenue and enforcement expense. Boyd was distinguished on the basis of the emphasis given in U.S. v. Coin and Currency, 401 U.S. 715, 718, to the fact that the Boyd penalty applied to a full-fledged criminal offense while the penalty here was for acts without criminal intent.

These cases lead to the conclusion that the civil penalty provisions of Public Act 73-665 are not quasi-criminal. The legislature clearly intended the actions to be civil in form. Most important, there is no requirement of proof of any culpable mental state to establish liability for civil penalties.* Thus, the civil penalty provisions of section 2 of Public Act 73-665 are not quasi-criminal for the purpose of the privilege against self-incrimination of the Fifth Amendment. This does not, however, mean that persons called upon to provide information in civil penalty actions under that section cannot invoke the Amendment's protection.

The privilege against self-incrimination can be invoked in many instances in which the government seeks to compel testimony or the production of information in proceedings that are neither criminal nor quasi-criminal. The key question is not whether the proceeding in which the privilege is claimed is criminal, but whether the information sought is likely to subject the claimant to criminal liability. Thus the Fifth Amendment privilege may be claimed in a civil action, U.S. v. Kordel, 397 U.S. 1, 7 (1969), and cases cited therein, or in a statutory inquiry. Malloy v. Hogan, 378 U.S. 1 (1963). It can be claimed in an action in a jurisdiction in which there is no possibility of criminal prosecution, if the protected information is likely to incriminate the claimant in another jurisdiction. Thus, the U.S. Supreme Court has held that a state can't compel testimony of a person who has been granted immunity from state prosecution, where there was a likelihood that the information would be used against the individual in a federal criminal prosecution. Murphy v. Waterfront Comm'n, 378 U.S. 58 (1964). In addition, individuals required to report certain types of information to government agencies pursuant to a regulatory scheme can exercise the privilege and refuse to report if there is sufficient likelihood that the information will incriminate them. U.S. v. Sullivan, 272 U.S. 259 (1927); Marchetti v. U.S., 390 U.S. 39 (1968); Leary v. U.S., 395 U.S. 6 (1969).

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*This is in contrast with provisions of Chapter 474a, Title 25, Section 25-54g of the water resources law which provides both civil and criminal penalties for wilful or negligent violations of any provision of Chapter 474a.

The privilege against self-incrimination can be claimed in civil penalty proceedings because there are state and federal criminal laws that apply to acts that also violate the civil penalty provisions.

The Department of Environmental Protection is empowered by Chapter 474a, Title 25 of the Connecticut General Statutes to compel the production of certain types of information and the keeping of certain kinds of records. The Commissioner can hold hearings required by the provisions of Chapter 474a, Title 25 of the C.G.S. at which he can take testimony and subpoena witnesses and evidence (Section 25-54c(g)). The Commissioner can require "the submission of plans, specifications and other necessary data for...pollution abatement facilities and disposal systems." (Section 25-54c(h)). In addition the Commissioner may require any person or municipality to keep "such records relating to pollution, possible pollution or the operation of pollution abatement facilities as he deems necessary to carry out" his powers to combat water pollution. The Department has access to such records and can compel their production (Section 25-54d). These provisions for obtaining information may be very important in the administration of the civil penalties program.

There are criminal penalties for water pollution control. Section 2(a)(2) of Public Act 73-665 provides for civil penalties for "deposit, placement, removal, disposal, discharge or emission of any material or substance" in violation of a number of statutory provisions including a number from Chapter 439, Part II of Chapter 474 and Chapter 474a of the C.G.S. Section 25-54q of Title 25, Chapter 474a of the C.G.S. establishes criminal penalties (fine and/or imprisonment) for wilful or negligent violation of the same provisions of Chapter 439 and any provision of Part II of Chapter 474 or Chapter 474a. Federal statutes establish criminal penalties that are roughly the same as the state penalties for wilfully or negligently violating various water quality standards. 33 USC 1319 (c)(1). These penalties cover many of the same acts that are covered by the state penalties. Thus, information sought for civil penalty proceedings may be protected if it incriminates under these state and federal statutes.

The courts have relied on a general standard for deciding whether the likelihood of incrimination is sufficient to warrant exercise of the privilege. The standard is stated thus: there must be a "'real and appreciable' and not merely 'imaginary and insubstantial' hazard of self-incrimination." See for instance Marchetti v. U.S., 390 U.S. 39, 48 (1968); Rogers v. U.S., 340 U.S. 367, 374 (1951); Brown v. Walker, 161 U.S. 591, 599-600 (1896).

....to be a witness against himself.....

The protection of the Fifth Amendment privilege against self-incrimination extends only to cases in which there is a substantial likelihood that the information in question will incriminate the person seeking the protection. The information in question must be personal to the claimant. One person cannot refuse to divulge information because it might incriminate another. The privilege does not apply to records that a government agency requires a person to keep pursuant to a valid regulatory program. Such "required records" are held to be public in nature, not private, and the privilege only extends to the latter class of information. Records that the Connecticut water pollution laws mandate may well be public, and thus not under the protection of the Fifth Amendment. The privilege against self-incrimination does not apply to any material which could possibly lead to incrimination.

The "required records" doctrine was established in Shapiro v. U.S., 335 U.S. 1 (1948). This case involved a criminal prosecution for violation of the regulations of the federal Office of Price Administration in which the defendant had been compelled over objection to produce certain records which the OPA statute mandated. The court held that the privilege against self-incrimination was not applicable to

> records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained. 335 U.S. at 17 quoting from Wilson v. U.S., 221 U.S. 361, 380 (1911); see also Heike v. U.S., 227 U.S. 131, 143 (1913).

The court distinguished "required records" from private records with three criteria. The former were required to be kept by appropriate legislation. They were of unquestioned relevance to the lawful purposes of the agency involved. Finally the records in question related to transactions that could be undertaken only with a government license. 335 U.S. at 32-43. It mentioned examples of cases in which private unincorporated business people could be required to produce records mandated by statutes when on trial for criminal violations. 335 U.S. at 17-18. These cases involved the statutorily required records of

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*These cases were cited with approval in a dictum in Wilson v. U.S., 221 U.S. 361, 381 (1910).

druggists, State v. Donovan, 10 N. Dak. 203, 74 Iowa 580; State v. Cummins, 76 Iowa 133; State v. Smith, a coroner; People v. Coombs, 158 N.Y. 532, and a railroad, L & N RR Co. v. Commonwealth, Ky. 51 S.W. 167. See also, U.S. v. Resnick, 488 F. 2d 1165 (1974)(5th Cir.), in which the record-keeping provisions of the federal firearms law were upheld as required records under the Shapiro doctrine, U.S. v. Kaufman, 429 F. 2d 240 (1970)(2nd Cir.) in which a registered broker-dealer was required over objection to produce records required by S.E.C. regulations; Fairbanks v. Hardin, 429 F. 2d 264 (1970)(9th Cir.) in which a registered livestock dealer was denied the privilege concerning required records; and U.S. v. Webb, 398 F. 2d 553 (1968)(4th Cir.) in which there was held to be no privilege concerning records kept by a carrier pursuant to regulations under the motor carrier act.

In more recent years the Supreme Court has emphasized somewhat different aspects of Shapiro. In Marchetti v. U.S., 390 U.S. 39, 57 (1968) and Grosso v. U.S., 390 U.S. 62, 67, 68 (1968) the court identified the following three basic elements of Shapiro: first, records required were of the same kind as he customarily kept, second, the records had public aspects analogous to public documents, and third, the information requirements were imposed in an essentially non-criminal and regulatory area of inquiry. This could be read as a limitation on the Shapiro doctrine. The first criterion suggests that record keeping requirements are limited by such regulatee's normal record keeping practices. This could not have been the intent of the court and in fact neither Marchetti nor Grosso dealt with situations at all similar to that one. Both cases involved record keeping and/or registration provisions in large measure designed to be or used as tools for uncovering criminal violations. It is unlikely that the court would move from the position that such record requirements were void to the position that records could not be required to be kept concerning activities of basically regulatory interest just because the regulatee kept no such records himself.

The Shapiro doctrine may eliminate a major area in which the Fifth Amendment privilege might be invoked in civil penalty proceedings. It could exempt all record keeping requirements established by the Commissioner under Chapter 474a, Title 25, Section 25-54d, from the protection of the privilege as long as they serve the valid regulatory purposes of the agency and are not designed or used to funnel incriminating evidence to prosecutors.

The final major issue of importance in self-incrimination cases is the degree of danger of incrimination needed before the privilege can be invoked. Where there is no danger there is no privilege. However, the danger need not be direct. It need only be "real and appreciable" not merely "imaginary and unsubstantial." The court has found the former criterion to be satisfied primarily in cases in which the reporting requirement serves to identify one as part of a class "inherently suspect" of criminal activities. Where the reporting requirement applies to the public at large or to broad segments thereof and is not by policy used to identify members of those groups guilty of criminal acts the court has tended to find the danger of self-incrimination to be of the latter type. Where there is no danger of incrimination the privilege cannot be invoked. Thus, if the only liability that can ensue from the production of certain information is civil, the courts will not uphold a refusal to come forth with the information. Amato v. Porter, 157 F. 2d 719 (1946)(2nd Cir.), Woods v. Robb, 171 F. 2d 539 (1948)(5th Cir.). There must be a statutory grant of immunity for an individual or corporation to plead the right of self-incrimination where there is danger only of civil liability. See Lebeouf, La. D.A.

#73-915; on the other hand, where there is a valid grant of immunity from any criminal prosecution against which the Fifth Amendment would protect there is no constitutional privilege against self-incrimination.

In Brown v. Walker, 161 U.S. 591 (1896) the privilege was not allowed in an ICC proceeding because an immunity statute provided protection of scope equal to that of the Constitutional provision. Brown was reaffirmed and followed in Ullman v. U.S., 350 U.S. 422 (1956) in which the court sustained a conviction for contempt for refusal to testify about subversive activities where an immunity statute provided protection as broad as that of the privilege. See Connselman v. Hitchcock, 142 U.S. 547 (1892) and Albertson v. SACB, 382 U.S. 70 (1965) for decisions holding immunity statutes to be too narrow to inactivate the privilege.

The privilege against self-incrimination extends to information which could not be the basis of a criminal conviction, but which could furnish "a link in the chain of evidence" needed to prosecute. Hoffman v. U.S., 341 U.S. 479 (1951). In Hoffman the court overturned a conviction of contempt for a refusal to answer grand jury questions that did not ask for direct evidence of criminal activities but merely of association with known criminals. See also Marchetti v. U.S., 390 U.S. 39, 48 (1968).

The question of how serious a danger of self-incrimination is necessary to activate the Fifth Amendment privilege is one with which the Court has had some difficulty. Before attempting to identify the key issues it would be wise to review the major cases.

In Sullivan v. U.S., 274 U.S. 259 (1927) the court refused to overturn a conviction for failure to file an income tax return. Sullivan had raised the defense that because his income was derived from illegal activities the return would incriminate him. The court held that whatever the incriminating effect of specific questions in the return, the return could clearly be filed without incrimination. The privilege could and should be raised with regard to specific items. Moreover the court argued that Sullivan's approach would make the taxpayer the sole arbiter of the validity of a claim of privilege, an unacceptable result.

In Albertson v. S.A.C.B., 382 U.S. 70 (1965) the court overturned an order of the Subversive Activities Control Board that the petitioners register as members of the Communist party. The court distinguished Sullivan and held that the registration requirement was directed at "a highly selective group inherently suspect of criminal activities" and that the privilege was asserted not "in an essentially non-criminal and regulatory area, but against an inquiry into an area permeated with criminal statutes" (382 U.S. at 79). The Court also argued that here, unlike the situation had the privilege been recognized in Sullivan, the petitioner was not the final arbiter on the question of the application. The Board had passed on the question.

In Marchetti v. U.S., 390 U.S. 39 (1968) and Grosso v. U.S., 390 U.S. 62 (1968) the court expanded on the Albertson case. Both cases involved convictions for failure to pay gambling taxes. (There was some difference in the taxes involved in the two cases. In addition, in Marchetti there was a registration provision not involved in Grosso.) In both cases the court overturned the conviction but refused to overturn the statutes. It was careful to distinguish Sullivan and Shapiro. The court argued that to file any gambling tax return would subject the petitioners to a "real and appreciable" danger of self-incrimination. This was because gambling and/or associated activities violated a criminal law of all states and the federal government. In Marchetti, the statute required lists of those registering and paying the gambling tax to be published and made available to law enforcement officials. In Grosso there was no such requirement, but the transmission of information was not prohibited either, and in fact there was a well-established policy of forwarding the information to law enforcement officials. As has been noted above, the court distinguished Shapiro. It noted that in these cases the records were required of a "selective group inherently suspect of criminal violations, and not part of an essentially non-criminal and regulatory area" as was the case in Shapiro. Marchetti, 390 U.S. at 57. In addition, the requirements were, unlike those in Shapiro, without public aspects and directed to records of a kind not customarily kept by the petitioner. The doctrine of Marchetti and Grosso has also been extended to the laws involving registration requirements for firearms, Haynes v. U.S., 390 U.S. 85 (1968) and transactions in marijuana, Leary v. U.S., 395 U.S. 6 (1969).

In these cases the key question is whether the statute is designed and used primarily as a tool for enforcement of criminal laws or the operation of a valid regulatory scheme.

II STATUTORY ISSUES

STATUTORY INTERPRETATION

The Connecticut courts look beyond express statutory authority and will uphold regulations which further the basic purposes of a statute and conform to its general approach.

In testing for conformity, the courts will look first to the "plain language" of the act. A conflict with the plain language will invalidate the regulations unless a literal application of that language will lead to "bizarre" and "unsupportable" results. If the statute is not plain, but ambiguous, the courts will employ a number of tests, including an investigation of the statute's legislative history, and will give special consideration to the agency's interpretation, particularly if it is longstanding. If the statute is remedial in nature, it will generally be permitted a broad application.

If the statute is penal, in the sense that it defines forbidden acts, the courts will construe it strictly. However, since the Enforcement Act does not delineate impermissible conduct, but merely provides an additional remedy for that conduct, this rule of construction is not applicable.

TO: CPEP Staff
DATE: November 7, 1974

FROM: Glen Gross

STATUTORY AUTHORITY AND RULES OF JUDICIAL INTERPRETATION: AN INTRODUCTION

I. Introduction

The purpose of this memo is to set forth the basic principles of law regarding both limitations on administrative regulations and the canons of judicial interpretation most relevant to the department's proposed program. The discussion is not meant to be exhaustive, but rather to be indicative of the general attitude of the courts. Of course, each specific question of statutory authority and interpretation will turn on its own facts and applicable precedents.

II. Statutory Authority

The general statement of the law is that regulations enacted by administrative agencies must have a clear statutory foundation. Thus, in affirming a decision of the U.S. Court of Appeals for the Second Circuit the U.S. Supreme Court said:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Manhattan Co. v. Commissioner, 297 US 129 134 (1936)
>
> Connecticut Law is in accord with the Federal Rule.
>
> No administrative or regulatory body can modify, abridge or otherwise change the statutory powers under which it acquires its authority unless the statute specifically grants it that power. South East Property Owners and Presidents' Association v. City Plan Commission 156 Conn 587, 592 quoting from State ex rel Huntington v. McNulty, 151 Conn. 447, 449 (1964).

Similar language was also used in Hartford Electric Light Co. v. Sullivan, 161 Conn. 145, 155 (1971); Finn v. Planning and Zoning Commission, 156 Conn. 540, 546 (1968) (Quoting the Huntington, supra language); Hammenberg

v. Holloway, 131 Conn. 616 (1945), State ex rel Baskin v. C.J. Bartlett, 13 C.S. 463 (1945) (quoting the Manhattan Co., supra language); Oles v. Liquor Commission, 10 CS 489, 492, 493 (1942). See also 30 Op. At. Gen. 135 (March 24, 1958).

It should be noted that the details of a regulation need not be expressly authorized by the legislature: In John J. McCarthy Co. v. Alsop, 122 Conn. 288 (1937) the court stated that a regulation by the Public Utilities Commission must be promulgated "by virtue of express provisions of law" or must be rules "such as are by fair implication and intendment incident to and included in authority expressly conferred." Thus, regulations will be upheld if they are within the implied authority of a statute as well as within its explicit authority.

In determining what is implied by an act the modern rule in Connecticut is to examine the purposes for which it was enacted.

> It is clear that the Danbury planning commission can exercise only the powers which are expressly granted to it by statute or such as are necessary to enable it to discharge the duties and carry out the objectives and purposes of its creation. Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109, 115 (1970).

The broad rule stated above should not, however, be read to mean that any administrative scheme that furthers the purposes of an act will be permitted. There must be a rational relationship between administrative regulations and the statute which they interpet.

> /I/n order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather we must search for statutory authority for the enactment. Finn v. Planning and Zoning Commission, 156 Conn. at 545 (1968), quoting from Avonside, Inc. v. Zoning and Planning Commission, 153 Conn. 232, 236.

To summarize, in assessing administrative regulations, the Connecticut courts look beyond express statutory authority and will uphold regulations which further the basic purposes of an act and conform to its general approach.

III. Rules of Statutory Interpretation

Ambiguity is liable to exist in any complex statute. The tendency toward confusion is especially likely in statutes which attempt a careful balance between parties with conflicting interests. It is therefore not surprising that the Enforcement Act contains provisions requiring clarification. What follows is a discussion of several principles which appear to be the most likely ones to be invoked in interpreting it.

The primary rule of statutory construction in Connecticut is the "plain language" doctrine.

> Legislative intent is to be found not in what the legislature meant to say, but in the meaning of what it did say. Mad River Co. v. Wolcott. 137 Conn. 680, 686, 81 A.2d 119.

The cases in support of this principle are legion.

The major exception to the plain language rule is the "bizarre result rule." Statutory construction which enables a statute to become effective and workable is to be preferred over one leading to an unsupportable and bizarre result.

> We must avoid an absurd consequence so as to attain a rational and sensible result which bears most directly on the object which the legislative body sought to obtain. United Aircraft Corp. v. Fusari, 311 A.2d 63, 163 Conn. 401 (1972) p 414.

Where confusion in the meaning of a term is apparent then another rule of construction may be relied on. Ambiguity in the meaning of a term will lead the court to review legislative history, the general approach of the statute and the basic purposes behind its enactment.

A fourth rule of construction is that an interpretation of a statute by those charged with administering it is entitled to great weight. Swendig v. Washington Water Power Co., 265 U.S. 322; Savings Bank of Rockville v. Wilcox, 117 Conn. 188. Furthermore, if an administrative interpretation has been acted on for a number of years it will not be disturbed except for very cogent reasons. State ex rel Bezzini v. Hines, 14 Conn. Supp 246, no error 53 A.2d 99, 133 Conn. 592 (1946).

The primary purpose of the Enforcement Act is to protect the environment, the public health, the public welfare and the public safety. Thus,a fifth rule of construction is applicable. Statutes which are remedial in nature will be given liberal interpretation. State v. Vachon, 161 A.2n 509, 140 Conn. 478 (1954).

A final rule of construction that might be raised is that penal statutes will be construed strictly. However, while of superficial applicability, this rule in fact does not apply to the Enforcement Act. The reason for construing penal statutes narrowly is to ensure that the public is provided with a precise definition of forbidden acts. Grievance Committee of the Bar of New Haven County v. Payne, 22 A.2d 623, 128 Conn. 325 (1941). The Enforcement Act does not define any forbidden acts; it merely provides an additional remedy for failure to comply with duties which are spelled out elsewhere. Therefore,the logic behind the strict construction rule is inapplicable.

IV. Conclusion

The basic principles for determining whether administrative regulations are authorized by statute are liberal in Connecticut. As long as the regulations 1) do not conflict with clear language of the act, 2) implement the basic purposes of the legislation, and 3) accord with the general approach set forth in the act, they will be upheld. Furthermore, where statutory language is ambiguous or where following the letter of a law leads to absurd results, the courts will interpret a statute broadly and give great weight to an administering agency's interpretation.

COST OF COMPLIANCE AS A BASIS FOR CIVIL ASSESSMENTS

The cost of compliance approach is either clearly authorized by or consistent with the various standards set forth in the statute, and is supported by the legislative history.

(1) The approach follows the express dictate and plain meaning of the "immediate and continuing compliance" standard of §2(b) of the Enforcement Act.

(2) Because the approach promotes compliance with environmental laws, it is necessarily consistent with the "external impact standards" of §2(b), which require the Commissioner to consider impairment to public health, safety and welfare, the public trust in the state's natural resources and reasonable (i.e., legal) use of property.

(3) The approach implements the mandate of §2(c) that the Commissioner consider at least seven factors in determining individual assessments. Four of these factors are similar to those articulated in 2(b); the others--the past conduct of a source, his present readiness to comply and his economic and financial condition--are covered by those sections providing the Commissioner with discretion to include prior violations in the calculus and to waive or to mitigate the assessment under certain circumstances.

(4) The cost of compliance approach addresses one of the primary concerns evinced from the legislative history; it permits a law-abiding regulatee to operate on the same economic footing as that of his dilatory competitor. The penalty schedule and the formula directly implement this policy.

TO: CPEP Staff

DATE: November 8, 1974

FROM: Phil Reed

II. B. Cost of Compliance as the Basis for Civil Penalties

The civil penalty regulations proposed by the Department are based on the costs of compliance with air pollution standards. That is, the schedules proposed in section 22a-6b-602(d) and the assessment process for individual cases proposed in section 22a-6b-602(e) are designed to enable the Department to eliminate the economic benefits of delayed compliance by, in effect, taxing them away through civil penalties. This program is designed to achieve three objectives:

(1) to ensure prompt compliance with environmental standards;

(2) to equalize the economic position of similar sources;

(3) to avoid excessive assessments against sources.

This section addresses the question whether civil penalties based on the costs of compliance -- economic civil penalties -- are authorized by and consistent with section 2 of Public Act 73-665. The question is broken down into five parts. The first two deal with the relationship of the cost of compliance approach to section 2(b) of the act and its standards concerning the adoption of penalty schedules. The third part is a consideration of whether the cost of compliance approach is consistent with section 2(c) of the act and its standards for setting penalties in individual cases. The fourth part is an examination of the impact of the legislative history of the act on the question. The fifth part is a discussion of the extent to which the proposed regulations implement the cost of compliance approach. The conclusion of the five part analysis is that the economic civil penalties are indeed authorized by and consistent with section 2 of Public Act 73-665.

1. The cost of compliance approach is clearly authorized by the "immediate and continual compliance" standard of section 2(b) of Public Act 73-665.

Section 2(b) of the act requires in part that in adopting penalty schedules, the commissioner "consider the amounts, or ranges of amounts, of assessment necessary to insure immediate and continued compliance...." with relevant environmental laws.

The regulations include a penalty schedule based on the cost of compliance.

> "The maximum monthly amounts set forth in this schedule represent the economic advantages a person responsible for an unabated activity could gain from one month's delay in bringing that activity into compliance. (They are calculated by multiplying the cost of compliance times one twelfth the cost of capital.)" (Sec. 22a-6b-602(d)(i))

This schedule satisfies the "plain meaning" of the statutory provision. The penalties in the schedule, in effect, tax away the economic gains of noncompliance. The existence (and effective use) of the penalties will eliminate the economic incentive to refuse to expend the money necessary to come into compliance with applicable air emission standards. This should have a substantial influence on regulatees that are businesses and whose decisions are based on economic incentives. The proposed schedule thus follows the express dictate and plain meaning of the "immediate and continued compliance" standard of section 2(b) of the act.

2. The cost of compliance approach is consistent with the health, safety and welfare; natural resource protection; and use of property standards of section 2(b) of Public Act 73-665.

Section 2(b) of the act requires that in setting up the penalty schedules, the Commissioner, in addition to addressing the need for "immediate and continued compliance," consider

> the character and degree of injury or impairment to, or interference with, (1) public health, safety and welfare, (2) the public trust in the air, water, land and other natural resources of the state, and (3) reasonable use of property which is caused or is likely to be caused by the type of activity described in such schedule or schedules.

These factors might be termed external impact standards.

The external impact standards are less susceptible to a plain meaning construction than is the immediate and continued compliance standard. The terms "public health, safety and welfare;" "public trust in the natural resources of the state;" and "reasonable use of property" have very broad meanings. Nevertheless, the civil penalty schedule based on cost of compliance does reflect consideration of these standards in several ways.

The proposed penalty schedule protects public health, safety and welfare. It promotes compliance with air pollution standards which themselves are designed to protect public health, safety and welfare. (See Regulations of Connecticut Agencies, sec. 19-508-1 through 25, especially sec. 19-508-1(b). See also CGS secs. 19-505, 19-510). The economic civil penalty schedule also safeguards against penalty assessments that would be inordinately greater than the amounts needed to ensure immediate and continuing compliance and which would be detrimental to the state's economic welfare.

The penalty schedule in the proposed regulations protects the public trust in the state's natural resources by encouraging compliance with the state's environmental standards.

The schedule protects the reasonable use of property. One reasonable use of property that is jeopardized by continued non-compliance by some companies is the business enterprises of their competitors who do comply. The latter have assumed capital and operating costs not borne by the former. The cost of a compliance-based penalty schedule would balance this equation. On a more general level, the proposed schedule would protect the reasonable use of property by promoting compliance with air pollution standards which are also designed to prevent interference with such property use (see Regulations of Connecticut Agencies, sec. 19-508-1(b) and CGS secs. 19-505, 19-510).

Finally, the penalty schedule also takes all the external impact factors into account when viewed in conjunction with the provisions for setting penalties in individual cases. The schedule sets out maximum penalties as opposed to fixed amounts. Penalties assessed in individual cases can be lower than those in the schedule on the basis of the external impact standards. Section 22a-6b-602(e) specifically provides that penalties in individual cases may be set below the cost of compliance figure after consideration of relevant factors, including those relating to public health, safety and welfare; natural resources and property use spelled out in section 2(b) of the act. The penalties actually levied can (and doubtless will) vary according to the impact of the activity penalized on the public health, safety and welfare; the natural resources of the state and the reasonable use of property.

Thus, the use of cost of compliance as the basis for the penalties in the schedule in section 22a-6b-602(d) of the regulations conforms to the requirements of section 2(b) of the act.

3. The cost of compliance approach as applied in the regulations is consistent with the requirements of section 2(c) of the Public Act 73-665.

Section 2(c) of the act requires that in setting penalties in individual cases the Commissioner consider "all factors which he deems relevant, including but not limited to" seven specific factors:

(1) The amount of assessment necessary to insure immediate and continued compliance;

(2) The character and degree of impact of the violation on the natural resources of the state, especially any rare or unique natural phenomena;

(3) The conduct of the person incurring the civil penalty in taking all feasible steps or procedures necessary or appropriate to comply or to correct the violation;

(4) Any prior violations by such person of statutes, regulations, orders or permits administered, adopted or issued by the commissioner;

(5) The economic and financial conditions of such person;

(6) The character and degree of injury to, or interference with, public health, safety or welfare which is caused or threatened to be caused by such violation;

(7) The character and degree of injury to, or interference with reasonable use of property which is caused or threatened to be caused by such violation.

Four of these standards [(1),(2),(6),and (7)]cover the same ground as the standards of § 2(b) of the act. The other three are what might be called regulatee conduct and condition standards.

The procedures in the regulations [§ 22a-6b-602(e)] for setting penalties in individual cases ensure the consideration of all of these issues. As has been noted, a penalty based on the individual regulatee's cost of compliance is first calculated. This is responsive to the issue of ensuring immediate and continued compliance [§ 2(c)(1)]. For the reasons set out in pp. 2-3, above, it is also somewhat responsive to the external impact standards. [§ 2(c) (2), (6), and (7)]. The initial figure can then be lowered on the basis of consideration of the second through seventh factors set out in § 2(c). The regulations require the commissioner to consider these questions. They provide that the regulatee be given an opportunity to raise them at a hearing [§ 22a-6b-602(f)]. Thus there is general provision for taking all these factors into account in the setting of individual penalties.

In addition, specific provisions of the regulations establish special procedures for consideration of several of these factors. Section 22a-6b-602(b) provides for the inclusion in the period for which the penalty is assessed of certain periods prior to discovery of the violation. This enables the commissioner to take into account "prior violations" of the regulatee [Section 2(c)(4) Public Act 73-665] and the conduct of the regulatee in "taking all feasible steps... to comply" [Sec. 2(c)(3)]. Regulatees who have taken all feasible steps and who do not have a history of violation are given further consideration under the provision of Section 22a-6b-602(g)(4). That section provides for waiver of the penalty where the regulatee has taken "prompt and effective action" to bring an unabated activity into continuing compliance with applicable emission standards after receipt of a warning letter. This provision does not apply to regulatees who have ignored past notices of non-compliance [Sec. 22a-6b-602(g)(4)]. In addition, Section 22a-6b-602(g)(4) excludes from the period for which the penalty will be assessed "periods of non-compliance that were caused by extraordinary factors beyond the regulatee's control." This also will result in specific consideration of the diligence of the regulatee in coming into compliance and thus further satisfies the requirements of Section 2(c)(3) of the act.

In conclusion, the statutory standards for setting penalties in individual cases [Sec. (c)] are all taken into account in the approach set out in the regulations.

4. The legislative history of Public Act 73-665 supports a cost of compliance approach for civil penalties.

The use of cost of compliance as the basis for penalties listed in the penalty schedule and assessed in individual cases is directly responsive to one of the major concerns of the supporters of Public Act 73-665 in the Connecticut General Assembly. In the debates in both the Senate and the House, the legislation's proponents emphasized that it was intended to eliminate the economic incentives for non-compliance and the competitive disadvantage that could result from voluntary compliance. In the House debate (Wednesday, May 23, 1973), this point was made by three Representatives:

> Representative Richard H. Wagner stated:
>
> "Presently the procedures existant (sic) and available to the Commissioner are unfair to most companies. What I mean by this, Mr. Speaker, is that basically it can be a company that may comply with an order to abate pollution by making a capital expenditure, where another company may not, save the capital expenditure and tie up the matter in the courts. This gets to the heart of the problem, Mr. Speaker." (H-145, Connecticut General Assembly, House, Proceedings 1973, Vol. 16 Part 15, p. 7781)
>
> Representative Bernard L. Avcollie made the following statement:
>
> "Now, are we going to sit here and say that we've got a myriad of sections on the statutes which can't be enforced...literally can't be enforced? Are we going to say that we will permit large industry, municipalities and individuals to evade the law in the courts because it's cheaper to evade the law than it is to clean up the pollution? I don't believe we should do this." (H-145, Connecticut General Assembly, House Proceedings 1973, Vol. 16 Part 15, pp. 7794-95)
>
> Representative Gerald F. Stevens observed:
>
> "Presently, the only thing the Commissioner can do when a violator ignores the Commissioner's order is to refer it to the office of the Attorney General, and no matter how expeditious the Attorney General wants to be, there is no question but that attornies (sic) can tie him up in court for long periods of time, and, quite frankly, it's cheaper for many firms to continue to pollute, to pay the attornies' (sic) fees, write the attornies' fees off, than it would be to comply with the commissioner's

order." (H-145, Connecticut General Assembly, House, Proceedings 1973, Vol. 16 Part 15, p. 7796-97)

In the Senate debate on Tuesday, May 15, 1973, Senator Gunther had the following to say:

> "We are not trying to put people out of business but we do want to protect the businessman who is honestly complying. Some businesses spend millions of dollars bringing their air pollution systems into compliance with our law and a competitor down the street saves that money by hiring some legal expertise in delaying the matter in the courts for years." (S-97, Connecticut General Assembly, Senate, Proceedings 1974, Vol. 16 Part 8, p. 3549)

The General Assembly clearly expected that the legislation it passed would eliminate the economic advantage of non-compliance with the State's environmental laws.* The penalties based on cost of compliance address this objective in an absolutely straightforward and completely effective manner. Thus, the legislative intent definitely embraces the penalty scheme of the proposed regulations.

5. The penalty schedule and formula included in the proposed regulations implement the cost of compliance approach.

The cost of compliance concept introduced in the regulations includes all elements that affect the real costs a regulatee faces in complying with applicable environmental standards. It takes into account equipment, installation, operating and replacement costs. These costs are discounted at an appropriate rate. Taxes, inflation, and depreciation are also factored into the formula. (see sec. 22a-6b-602(b)(5).) The penalty schedule and initial individual penalties are based on this sophisticated cost of compliance formula. In dealing with individual cases, the proposed regulations apply the penalty to all appropriate portions of the period from the point at which a regulatee is responsible for compliance with environmental standards to the point at which compliance is achieved. The "assessment period" over which the penalty is assessed includes the entire period during which a regulatee fails to make the expenditures necessary for immediate and continuing compliance with applicable emission standards, except for time during which it is in compliance with a final abatement order. (Sec. 22a-6b-602(b)(1)). There is provision for limited inclusion of the period of delay between the date a regulatee is responsible for compliance and the date non-compliance is discovered. (Sec. 22a-6b-602(h)). Portions of this period of delayed compliance that are due to factors beyond the regulatee's control are, in effect, not counted in this period. (Sec. 22a-6b-602(g)(3)) Regulatees that take "prompt and effective action" to come into compliance after discovery by the department that they are in violation benefit from a waiver of penalties. (Sec. 22a-6b-602(g)(4)) This may be viewed as a dilution of the economic rationality of the penalty scheme, but applies only in cases where the desired goal -- compliance with emission standards -- is achieved with all reasonable speed.

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* None of those who spoke against the bill in either chamber expressed any opposition to this facet of it.

The assessment period established by the regulations removes the incentive for regulatees to delay coming into compliance in almost all cases. All delays for which the regulatee is responsible that occur after receipt of the warning letter are penalized. Delays prior to the receipt of the warning letter are penalized if the regulatee has been an enforcement problem in the past or if it does not move with reasonable dispatch toward compliance after receipt of a warning letter.

The penalty procedures set up in the regulations provide an effective mechanism for ensuring that penalties unreasonably greater than the cost of compliance are not assessed. The commissioner is empowered to obtain cost information from the regulatee to aid him in making an accurate cost calculation. (Sec. 22a-6b-602(i)). The commissioner has the option of delaying issuance of a notice of violation, deferring issuance of a final order after a hearing, or delaying collection of a penalty for a reasonable time if sufficient information for a reasonably accurate calculation is not available (Secs. 22a-6b-602(f), (g) (4)*.) Finally, the regulations include ample provision for mitigation of penalties that exceed actual costs. (Secs. 22a-6b-602(g)(1), (2)).

It should be noted that the regulations do provide for the assessment of penalties lower than those based on the cost of compliance. (See sec. 22a-6b-602(e) and the discussion under II.B.3., supra.) This will be the case, however, only where the statutory goal of immediate and continued compliance is achieved (Sec. 22a-6b-602(g)(4)) or where the external impact of the activities penalized warrants a lesser penalty. (Sec. 22a-6b-602(e)).,see the discussion under II.B.2 and 3 supra.) Thus, the proposed regulations do effectively implement the cost of compliance approach.

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* The regulations do not specifically call for delay of issuance of a notice of violation under sec. 22a-6b-10(a). However, the provision in sec. 22a-6b-602(g)(4) for issuance of a warning letter on discovery of a violation does appear to give him some leeway in this area. See the discussion under II.E. I. below.

COST OF CAPITAL

"Cost of capital" is examined in the context of utility rate cases and a single antitrust case.

Supreme Court rate cases have been read as holding that three criteria must be taken into account in computing a fair rate of return: (1) the credit maintenance standard, (2) the comparable risk standard and (3) the capital attraction (cost of equity) standard. The Department's cost of capital method employs all three standards.

The elasticity of acceptable methodology is apparent from federal and other state decisions. An "ideal" capital structure, rather than one based on the recent past, may be posited by the regulatory agency. The equity portion, in particular, may be derived from potential earnings-price ratios, dividend yields or any variation thereof.

In Connecticut, any "reasonable" method will suffice. Moreover, even if the chosen method has patent infirmities, it will be acceptable so long as the overall result is considered reasonable.

Cost of capital was excluded from damage calculations in one federal antitrust case. The method was held not generally acceptable to economists and insufficiently related to actual costs. The precedential value of the case is weakened, however, on two counts: (1) The court determined that the purchase in question would have been financed exclusively by debt (thereby making a cost of capital determination of its own, albeit at the lowest parameter); and (2) The Supreme Court affirmed on different grounds and the reasoning of that opinion has not been followed since.

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SUBJECT

Cost of Capital

Utilities: Federal Cases

The "cost of capital" method of arriving at a fair return on investment in a public utility has received the implicit sanction of the Supreme Court on several occasions. In Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia, 262 U.S. 679 (1923), the Court required that:

> "the return should be reasonably sufficient to assure confidence in the soundness of the utility, and should be adequate, under efficient and economical management to maintain and support the company's credit and enable it to raise the money necessary for the proper discharge of its public duties." 262 U.S., at 693.

Subsequently, in Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944), Mr. Justice Douglas, speaking for the Court, elaborated on the Bluefield requirements:

> "From the investor or company point of view it is important that there be enough revenue not only for operating expenses, but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and attract capital. The conditions under which more or less might be allowed are not important here." 320 U.S., at 603.

These standards have been construed to include three criteria: (a) the credit maintenance standard, (b) the comparable risk standard, and (c) the capital attraction standard, also known as "cost of capital." Fred P. Morrissey, "A Reconsideration of Cost of Capital and a Reasonable Rate of Return," 31 Jour. of Land Economics, 229 - 244.

More recently, in the Permian Basin Area Rate Cases, 390 U.S. 747 (1969), the Court approved the Federal Power Commission's use of the "comparable risk" method, but stated that "other standards might properly have been employed." 390 U.S., at 806. Footnote 83 of the opinion, expanding on the above, refers to J. C. Bonbright's Principles of Public Utility Rates, pp. 240 - 283, in which "cost of capital" is held to be the "basic standard of a fair rate of return." Bonbright, at 240.

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Since long-term debt cost assessment is an integral part of cost of capital, a proper application of the method will necessarily include consideration of credit maintenance. So long as returns for comparable business undertakings are weighed in the equity portion of the computation, the method is an acceptable measure of a fair rate of return by any reading of the Court's standards.

Federal Court of Appeals cases tend to echo the general language of the Supreme Court, and stress the "broad power" of the regulatory authorities to select evidence on which to rely. *Southern Louisiana Rate Cases v. Federal Power Commission*, 428 F.2d 407 (1970); *Powell v. Washington Metropolitan Area Transit System*, 485 F.2d 1080 (1973). One of the few restrictions upon the determination of fair return and reasonable dividend rates is to be found in *Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 (1968). Circuit Judge Robinson, speaking for the Court, declared:

> "A method for determining a fair return on a reasonable dividend yield which looks solely to a pegging of the market price of the company's stock at past levels is manifestly unacceptable." 415 F.2d, at 970.

Current conditions, then, must be looked to in the determination of cost of capital, although no particular calculus or mode of selection is specified.

Other State Cases

The actual mechanics of the "cost of capital" method are treated in a number of state cases concerning public utility rates. In *Pittsburg v. Pennsylvania Public Utilities Commission*, 126 A.2d 777 (1956), the Pennsylvania court said that in the determination of cost of capital the "best evidence is the recent past," and that prediction of the future in terms of an allowance for market fluctuation was "unwarranted." 126 A.2d, at 781. In *Riverton Consolidated Water Company v. Pennsylvania Public Utility Commission*, 140 A.2d 114 (1958), the same court said that a proper determination considers "the financial structure of the utility, credit standing, dividends, interest, attendant risks, regulatory lag, wasting assets, and any peculiar features of the utility involved." 140 A.2d, at 121. In response to the government's contention that the historical cost of capital was ignored the court replied that "[the recent past] alone is not controlling." 140 A.2d, at 122.

At least three steps are necessary to arrive at the cost of capital: (1) determination of capital structure, (2) assessment of cost of debt, and (3) assessment of cost of equity. The accepted capital structure (ratio of debt to equity) may be at variance both from the present and the recent past. *Riverton Consolidated Water Company*, *supra*. Most courts hold that calculations may be based on an "ideal" capital structure, one as it "should be" in opinion of the regulatory authority. *New England Tel. and Tel. Co. v. New Hampshire*, 97 A.2d 213, 220. See also *New England Tel. and Tel. v. Department of Public Utilities* (Mass.), 121 N.E. 2d 896. As a rule, the only limitation upon a hypothetical capital structure determination is that it be "reasonable." 97 A.2d, at 220, *supra*.

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The cost of debt capital is known factor and is generally not disputed. The current cost is generally controlling, but where it would be "imprudent" to replace outstanding debt, the historical cost may be used. United Gas Pipeline Co. v. Louisiana Public Service Commission, 130 So. 2d 652, 660.

There are several ways to compute cost of equity. The dividend yield method is favored in New Hampshire, New England Tel. and Tel. v. New Hampshire, supra, while the earnings-price ratio method is preferred in Louisiana and Pennsylvania: United Gas Pipeline and Riverton Consolidated Water, supra. In most jurisdictions, the principal method is buttressed with consideration of other relevant factors. 64 Am. Jur 2d 708. The most recent decision considering equity cost determination, Lower Paxton Township v. Commonwealth Public Utilities Commission, 317 A.2d 917 (1974), listed several criteria:

> "the demands for the use of money, the growth in earnings expected by the investor, earnings-price ratios, dividend yields, the marketing cost associated with raising common equity capital, and the earnings of comparable companies with similar risks."
> 317 A.2d, at 922.

Once again the court noted that there is "no magic formula: it's a matter of judgement based upon the record presented." 317 A.2d, at 922

Parenthetically, it should be added that company book entries may sometimes be modified in cost of capital determination. In Application of Wilmington Suburban Water Corp, 211 A.2d 602 (1965), the court overruled the Commission's decision to accept unqualifiedly the company's book cost depreciation and to refuse to give any weight at all to trended cost depreciated. 211 A.2d, at 607.

Connecticut Cases

The Connecticut courts do not make specific reference to the "cost of capital" method in setting a fair rate of return. It is, however, reasoning from U.S. Supreme Court decisions, a "reasonable" method, and Connecticut allows great discretion to its regulatory bodies in determining what is "reasonable" in specific instances. In New Haven Water Company v. Public Utilities Commission, 305 A.2d 863 (1972), the Court of Common Pleas denied the company's appeal of the Commission's decision disallowing a 23% rate increase. Judge Aaronson noted that "no satisfactory definition of reasonable, as applied to rates, applicable to each case, can be made." The court "cannot substitute its discretion" for the Commission's, and is not "bound by any single formula or rule." Moreover, "it is the result reached, not the method employed, which is controlling. 'The fact that the method employed to reach that result may contain infirmities is not then important.' Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602..." 305 A.2d, at 865. See also Town of Vernon v. Public Utilities Commission, 318 A.2d 121 (1971): Turner v. Connecticut Co., 91 Conn. 692.

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In Noroton Water Company v. Public Utilities Commission, 24 Conn. Sup. 441 (1962), the **Superior Court** approved the Commission's rate authorization which admittedly entailed a sharp reduction on equity return. Judge Devlin said briefly that "sufficient facts were incorporated to negative any claim that the prescribed rates were confiscatory." 24 Conn. Sup. 441, at 445.

It should be noted that in all of the above cases determination of cost of capital is a liminal step in the determination of a fair rate of return for the utility in question. Thus actual cost is constantly modified by silent cost. However, even determination of actual cost - especially for equity - involves selection from conflicting data and interpretation, and in this respect the tradition of deference to agency judgement is encouraging.

The Antitrust Analogue

In Hanover Shoe, Inc. v. United Shoe Machinery Corporation, 245 F.Supp. 258 (1965), an antitrust case, cost of capital was rejected as a proper element of damage calculation. United was guilty of antitrust violation, and the amount to be trebled was essentially the difference in cost between leasing and purchasing certain machines. United **attempted to inflate the purchasing** cost (and thus lower the difference) by including cost of capital, but the District Court concluded that cost of capital "is not an item of cost or expense that would directly affect Hanover's profits and losses in any year." 245 F. Supp., at 292.

On appeal, 377 F.2d 776, Circuit Judge Freedman, speaking for the Third Circuit, said:

> "The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation." 377 F.2d, at 792.

The U.S. Supreme Court affirmed on this point, **not because the cost** of capital method was necessarily improper, but because the District Court had also found that Hanover would have funded the purchase entirely through low-interest debt.

> "[The court found that] had Hanover bought the machines it would have obtained the necessary capital by borrowing at about 2.5%. It therefore deducted an interest component of 2.5% from the profits it thought Hanover would have earned by purchasing the machines." 392 U.S. 481, at 504.

To my knowledge, the District Court's decision concerning cost of capital has neither been followed nor opposed in succeeding cases.

JUDICIAL REVIEW OF FORMULAE

The standards of judicial review for the civil assessment formula are yet to be determined, but case law from analogous areas suggests probable patterns.

Cases involving the capitalization method of establishing property values for tax purposes are virtually uniform in holding that the challenger holds the burden of proving that a tax board's method of capitalization was unreasonable. However, if the statute in question enumerates several factors to be considered in making a determination, it must be clear from the record that all factors have indeed been considered.

In rent control cases, schedules which had been adopted by the commission correllating income rates or repair costs with various classes of buildings were approved by the courts even though the schedules were not mentioned in the enabling legislation. Again, all factors listed specifically in the statute had to be officially considered, but the schedules themselves would not be rejected unless found to be without rational basis or arbitrary and capricious. Cases dealing with minimum wages, public utilities and environmental regulation reach similar results.

With regard to the civil assessment formula, the case law suggests:

(1) That a challenger must demonstrate that an assessment determined by the formula is a substantial overvaluation of the cost of compliance;

(2) That while special allegiance is owed to no single factor and additional factors may be considered, every specifically enumerated factor must be dealt with individually;

(3) That schedules will be acceptable provided that opportunity is afforded the source to demonstrate special circumstances mandating deviation from the formula.

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SUBJECT JUDICIAL REVIEW OF FORMULAE

This memo examines patterns of judicial review in the context of administrative law areas that embody any of the following elements: (a) remedial statutes; (b) statutes listing factors to be included in the administrator's decision; and (c) economic calculations (e.g., cost of capital).

I. Tax Assessment: Tax assessors (and courts) agree that the best method of valuation is to look for "good faith" sales of comparable pieces of property. However, if such comparable sales do not exist, most tax assessors fall back on some variant of a capitalization method to establish property values. C.G.S. §12-62 provides that assessors shall revalue property every ten years, but the statute fails to mention any specific factors required to be part of the assessor's calculus. The Connecticut Supreme Court, however, has given its sanction to the use of capitalization in the absence of comparable sales. Burritt Mutual Savings Bank of New Britain v. City of New Britain, 154 A. 2d 608 (1959). The court recognized that a number of factors were involved in capitalization so that "mathematical accuracy is not necessarily achieved in their use," and established two guidelines for judicial review:

(1) Capitalization results should be closely scrutinized because judgments as to particular factors, although made in the best of faith, could lead to widely divergent results.

(2) Because assessment is an administrative procedure and calls for approximations and judgments on matters where there may be a margin for difference of opinion, the law contemplates a wide discretion be accorded the assessors and that the assessor's action be overturned only if it is "discriminatory or so unreasonable that property is substantially overvalued and thus injustice and illegality result."

In Burritt as well as Leonard Building Corporation v. City of New York, 154 A. 2d 614 (1959), the court held that the burden of

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proving either the factors or method of capitalization used by the tax board were unreasonable and fell on the challenger. Specifically, in *Leonard*, the court noted that the tax board had no burden to prove that the capitalization method it had used was "a proper one or more appropriate one to employ."

Majestic Great West Savings v. Reale, 499 P. 2d 644 (1972), involved a Colorado statute that listed several factors to be considered by the tax board in its assessments. A lower court had replaced the tax board's finding with one of its own. Thus the appellate court had to judge the legitimacy of two separate assessments in light of the statutory guidelines. First, it affirmed the trial court's finding that the tax board had totally ignored two of the listed factors in the statute. Second, it held that despite appearing to have been determined primarily on two of the listed factors, the decision indicated that all of the listed factors were at least considered. Therefore, it affirmed the trial court's assessment.

Albemarle Electric Membership Corporation et al v. Alexander, Sup. Ct. No. Car.192 S.E. 2d 811 (1972), is a tax assessment case with three relevant characteristics: (1) it involved a statute that directed tax assessors to consider certain factors, including the "market value of a company's capital stock and debt"; (2) the Court had to review the State Tax Board's response to "market value" which was included *inter alia*, and (3) the judicial review section of North Carolina's Administrative Procedure Act is identical to C.G.S.A. §4-183(g).

Businesses like those of the appellants were organized (with the help of legislative incentives) because investor-owned utilities could not profitably provide services to rural areas of the state. One of the results was that there existed a large disparity between the face amount of appellants' mortgage debt and equity and the value such debt and equity would bring should appellants try to arrange a sale in the marketplace. The problem for the Board was to follow the statute's dictates and yet try to adjust for this disparity.

Appellants charged that the Board's efforts (which included capitalization of income) resulted in a confiscatory, excessive valuation. In analyzing its scope of review in light of North Carolina's Administrative Procedure Act, the Court held:

(a) The assessment must be presumed to have been made according to the statute and every reasonable intendment will be made in support of that presumption.

(b) Because the duties of the Board are "quasi-judicial" the courts ought to refrain from interference unless the Board's actions are found to be arbitrary or capricious. (N.B. This would seem to suggest that where the Connecticut agency's action is "quasi-judicial," i.e., the action under §2(c), the appropriate standard of review for the court is that of C.G.S.A. §4-183(g)(6): "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.")

(c) The challenging party has the burden of proving that the method of calculation used by the Board was arbitrary and illegal. It must present competent evidence that the assessment substantially exceeds the true value of the property. Furthermore, the Court found appellant had a duty to come forth with such evidence at the Board level.

(d) The Board is not under an obligation to unquestionably accept the taxpayer's own evidence: "The futility of allowing a taxpayer to fix the final value of his property for taxation is so apparent it decries discussion."

II. Rent Control

Rent control statutes are remedial in nature, designed to protect tenants from undue consequences of imperfect markets while guaranteeing landlords 'reasonable' returns on their property, 52 C.J.S. §55-2. In construing such statutes, courts are to be liberal, except where the landlords' old common-law right are at stake (in which case the statutes are to be strictly construed in favor of those rights). Ibid. §551-6. As for administratively imposed regulations and orders, the presumption is in favor of conformity with the relevant statute (and regulations in the case of rent orders). Such regulations and orders will not be set aside unless plainly and palpably inconsistent with the statute/regulation, see, e.g., Grenewicz v. Ligham, N.J. 111 A. 2d 293 (1955).

The rent control law of New York reflects both a statute that in various places commands the Rent Control Administrator to account for certain factors and a well-delevoped case law as to judicial review of the Administrator's actions.

The basic statutory scheme calls on the Administrator to make adjustments of maximum rents where, inter alia, the rental income from a property yields a yearly net return of less than 6% of the value of the property. Then the statute directs the

the Administrator to value the property at its assessed value "except where there has been a bona fide sale...as a result of a transaction at arm's length, on normal financing terms at a readily ascertainable price and unaffected by special circumstances," Bajart Management, Inc. v. Weaver, 185 N.Y.S. 2d 341, 343 (1959). To answer whether or not the sale was on "normal financing terms" another part of the statute directs the Administrator to consider a list of factors, the final one of which is a catch-all (i.e., "any other facts or circumstances which in the agency's judgment have bearing..."), Colton v. Berman, N.Y. Ct. Aps. 287 N.Y. 2d 647, 655 (1967). The following cases illustrate the nature of judicial reaction to agency action pursuant to this statutory scheme:

(a) Bajart, supra: The Rent Commissioner used the assessed value of property the landlord had recently purchased without ever considering the possibility that the sale price should be used. The Supreme Court (App. Div.) held that where the statute (or regulation) mandated the use of a specific basis for rent increases, the Commissioner could not vary the statute (or regulation) by adopting a different standard. While this sounds tough, the Court's action is instructive. It remanded the case to the Commissioner and basically told him that all he had to do was consider the possibility that the sale was 'bona-fide, etc.'. If he concluded to the contrary, then use of assessed value would be acceptable.

(b) Philip-Toby Realties, Inc. v. Weaver, Sup. Ct. Ap. Div., 186 N.W.S. 2d 465 (1959). Among legitimate landlord expenses included in the calculus needed to answer whether the landlord makes at least 6% are management fees. To deal with this, the agency adopted schedules which matched various rates (percentages of rental income) to classes of buildings (size, type, etc.). These rates would be used absent a showing of special circumstances by the landlord to the agency. The Court approved the schedules as a proper exercise of the agency's authority. "Resort to a standard rate prevents landlords from obtaining benefits of improvident or collusive agreements which would be difficult to uncover," Ibid, p. 468. Furthermore, the Court put the burden on the landlord to prove, by the evidence presented to the agency, that the agency's adherence to its schedule was arbitrary or unreasonable.

(c) Acker v. Berman, Sup. Ct. N.Y., 283 N.Y.S. 2d 194 (1967). This case involves another "schedule" adopted by the agency, this time to reflect the costs of repairs and maintenance produced by different classes of buildings. Buildings with 12 or fewer units were allowed 13% of annual rent for maintenance costs. Those with 13-39 units and an elevator were allowed 8-1/2%. Again, landlords were given the opportunity to show the agency "special circumstances." Petitioner's building had 8 units plus an elevator. The agency informed him that absent detailed cost information, they would use the 8-1/2% figure. He refused to supply the detail and appealed.

The court held that the "inflexible" use of the 8-1/2% figure in situations like petitioner's was an abuse of discretion because the same rationale (purpose behind the schedule) which dictated higher figures for smaller buildings dictated a different figure here. Thus, while the court implicitly approves the use of schedules, it requires the figures adopted to be reaslistic in light of the rationale behind the classification. Furthermore, absent such "realistic" figures, the agency is not justified in placing the burden of supplying alternative, detailed cost data on the landlord. Presumably, in such a situation the burden would rest with the agency.

(d) Colton v. Berman, Ct. Aps. N.Y., 287 N.Y.S. 2d 64F (1967). Tenants challenged the agency's finding that the landlord has used "normal financing." The court found that the rent control statute in general (and the statute's part re: "normal financing" in particular had, inter alia, two purposes: first, to prevent uncontrolled agency discretion yet avoid such strictures as would permit landlords to manipulate sales to provide a higher rent base; second, to avoid protracted valuation proceedings ("of the kind associated with utility regulation"). Given these purposes, the Court found:

(1) All a reviewing court can require is that the agency's findings have a rationale basis in the record and not be arbitrary or capricious.

(2) All factors listed specifically in the "normal financing" statute (see above) must at least be considered. However, "the catch-all 'factor' (inter alia)... is potent evidence that the Administrator is not to be bound by satisfaction (or non-satisfaction) of any one standard," Ibid, p. 655-6.

III. Other Areas of Law:

A. Environmental Protection: The only relevant case located (aside from Waukegan) in this area of the law is a helpful one. In United States Steel Corp. v. Dept. of Environmental Resource, Pa. Cmwlth., 300 A. 2d 508 (1973), the Court reviewed a penalty assessed against U. S. Steel by the DEP pursuant to a statute that listed several factors for DEP's consideration. The Court noted that in the particular ajudication's record concerning the basis for the penalty assessed, there was no mention of some of the factors in the statute. Nonetheless, the Court concluded that its review was limited to a search for an error of law or abuse of discretion absent which it could not "second-guess" the imposition of the penalties, Ibid, 514. (The Court did find an abuse of discretion in an unexplained alteration in the penalty not related to this memo). It's worth noting that Pennsylvania's administrative procedure statute is not identical to Connecticut's.

B. Minimum Wages: This area also involves a remedial statute (like rent control) that calls for economic calculations re: "the cost of living." In Hotel & Restaurant Association of Kentucky v. Commissioner of Dept. of Industrial Relations, Ct. Ap. Ky., 374 S.W. 2d 501, (1963), the Court comes to the same general conclusion as those found in the rent control discussion above.

C. Public Utilities: See the working paper concerning "cost of capital."

CONCLUSIONS

1. In view of the wide discretion usually accorded agencies and the difficulty of mathematical accuracy in these situations, the challenger must prove that the penalty determined by the formula is a substantial overvaluation of the cost of compliance. Given the N.Y. rent control cases and the Connecticut Administrative Procedure Act, a corollary argument can be made that the challenger has a duty to initially submit evidence as to the overvaluation at the agency hearing before a review court would even consider such a claim.

2. In creating the formula as well as setting particular penalties, the agency must at least consider each and every one of the factors listed in §2(b) or (c), respectively. But, in light of the factors listed in §2(b) (c) of the catch-all phrase "all factors which (the Commissioner) deems relevant" as well as the

cases discussed above, absolute fidelity by the agency is owed to no single factor. However, neither the formula nor the penalty order may contravene the overriding legislative intent of the statute (and regulations).

3. Schedules that depend, in part, on classification of business or capitalization formulae are valid so long as (a) the classification or formulae are consistent with the rationale behind their use and (b) an opportunity is provided at the hearing level for each respondent to demonstrate "special circumstances" that require a deviation from the schedule/formulae usually used. Note well, however, the agency is under no obligation to accept without question the data supplied by the respondent. Indeed, if such data is obviously self-serving, the agency can reject it. The cases (e.g. rent control) supporting this point are further buttressed by noting that they involved an effort to protect the interests of property owners subject to economic regulation. Certainly an *a fortiori* argument can be made that the interests of property owners subject to penalties because they have been adjudged "wrongdoers" should not be any greater.

DEFERRAL OF ASSESSMENT CALCULATIONS

Three options are presented for deferring the calculation of civil assessments. Option One involves the issuance of a warning letter upon the discovery of a violation, and the withholding of the statutory notice of violation until receipt of sufficient data. Option Two adheres more closely to the statutory language; upon discovery, a notice of violation would be issued indicating the amount of the assessment based on the Department's best estimate. Since the statute provides for reducing but not raising the stated amount, there would be a compelling reason to set the assessment at the highest reasonable figure and then to mitigate when actual cost of compliance data becomes available. Option Three is similar to Option Two except that the assessment would be stated in terms of the formula rather than as a dollar amount. Each of these options raises the question of the extent to which it is authorized by the statute and if not, whether the Department can utilize the procedure through the exercise of its administrative discretion.

Option One is not specifically authorized by statute, and although administrative officers have broad discretion in rulemaking, the Connecticut courts tend to scrutinize procedural regulations more closely than they do substantive regulations.

The maximum mitigation procedure of Option Two raises no major legal problems. It finds support in the wording of the statute and is widely used by those federal agencies which employ civil assessments.

Option Three appears to contradict the specific language of the statute, but cannot be categorically ruled out. The distinction between "amount" and "rule" is considered separately in another memo.

TO: CPEP Staff
FROM: Phil Reed
SUBJECT: DEFERRING THE CALCULATION OF CIVIL PENALTIES

The purpose of this memorandum is to present a legal analysis of three options for deferring the calculation of civil penalties. As has been discussed above, calculation deferral would give the penalties a rational economic basis and would help minimize the administrative costs incurred in their utilization. Preliminary studies of this subject led to the identification of three deferral options which appeared to be legally and/or administratively workable. This memo represents the results of an extensive though not exhaustive inquiry into the legal issues raised by these options. Further research is needed, but sufficient work has been done to provide a sound gauge for assessing the three options.

The Deferral Options

The three options have been discussed in the introductory memorandum but warrant additional description here. Option One involves a modification of the civil penalty assessment procedure provided in the statute. Upon discovery of a violation the Department would withhold the statutory notice of violation, and would instead issue a formal warning setting out the violation charged and indicating the potential liabilities for a civil penalty. The warning could be issued concurrently with the issuance of an abatement order or independently. The Department could also provide for an informal hearing to be held at the violator's request. The formal notice of violation would not be issued until an engineering report had been submitted by the violator (probably pursuant to a final abatement order) or until the violator completed compliance with the abatement order. The notice would include a statement of the amount of the penalty calculated on the basis of actual cost figures and, to the extent possible, the length of the actual period of delay. From this point on the procedure would follow the statutory provision. Option One would reduce the amount of investigative work required of the Department and would therefore reduce administrative costs. It would also enable the Department to use accurate cost of compliance data as the basis of the civil penalties.

Option Two follows the statutory scheme more closely at the possible cost of an increased administrative workload. In this procedure the Department would issue a statutory notice of violation upon establishing the existence of a violation for which a civil penalty was an appropriate remedy. The notice would indicate the amount of the penalty to be charged which would be based *inter alia* on an estimate of the cost of compliance and the duration of noncompliance. It would be costly for the Department to do the investigative work necessary to accurately assess the cost of compliance. There would thus be a compelling reason to merely set the penalty at the highest reasonable figure (perhaps at the maximum allowed by the statute and schedule). The fact that the statute provides for reducing but not raising the penalty set out in the notice of violation in the final order provides an additional incentive for setting a high initial penalty. The initial penalty could be mitigated if it substantially exceeded the penalty calculated when actual cost of compliance data was available. The mitigation could be accomplished by returning excess payments or by deferring collection of the penalty until engineering information was available or until compliance.

Option Three is a variant of Option Two. The difference between the two involves the statement of the penalty in the notice of violation. In this option the penalty would be stated not as a dollar amount but in terms of the formula used to calculate it. In theory this would give the violator reasonable notice of the scope of this potential obligation and would limit the department's administrative workload. The actual amount of the penalty would be calculated at the time of compliance.

Legal Analysis

There are two key legal questions raised by these alternative procedures. The first concerns the extent to which each is specifically authorized by the civil penalties statute (Public Act 73-665 Section 2). The second question is the extent to which the Department can utilize those procedures not specifically authorized by the statute through the exercise of its administrative discretion.

Conclusions

The delay in issuance of the notice of violation and the letter of warning and informal hearing included in Option One are not specifically authorized by the statute. There are reasonable arguments on both sides of the question as to the extent to which the option falls within the broad purpose of the statute. The question of whether Option One could be adopted by the Commissioner in the exercise of his discretion cannot be given a definitive answer. Administrative Officers have broad discretion in rule-making, but their actions must be within the parameters established by the statute. Connecticut courts have been somewhat stricter in applying this standard to procedural regulations than to substantive regulations.

The maximum mitigation procedure of Option Two raises no major legal problems. It finds support in the wording of the statute and is widely used by federal agencies which have the civil penalty power.

The use of the penalty formula instead of a dollar amount in the notice of violation prescribed by Option Three appears to contravene the specific language of the statute. Although the question is not closed, there is substantial evidence that this was not in the contemplation of the legislature when it enacted Public Act No. 73-665.

The Civil Penalties Statute and the Deferral Options

In this section the key features of each deferral option are discussed in terms of the extent to which they are specifically authorized by the statute (Public Act 73-665 Section 2).

Option One calls for lengthy delays in the issuance of notices of violation and injects extra notice and hearing steps into the delay period.

The statute is ambiguous concerning the timing of issuance of notices of violation. It provides that

> "If the commissioner has reason to believe that a violation has occurred for which a civil penalty is authorized by this section, he may send to the violator,...a notice..."
> (emphasis added) Section 2(d).

The above passage can be interpreted in two ways. The word "may" can indicate discretion or power and authority.

> "may,[2]...6. Law To have liberty or power to: often (in the construction of statutes) held to mean must; as imposing an obligation, though in every other use

may has only a permissive or discretionary connotation."

Funk & Wagnall's New Standard Dictionary 9th English Language 1946 edition, p. 1531.

The interpretation that the term "may" should not be treated as mandatory is given some support by the case of *Broadriver, Inc. v. City of Stamford*, 158 Conn. 522, 265 A. 2d 75, cert. denied 398 U.S. 938, 90 S.Ct. 1841, 26 L.Ed. 2d 270, in which the court said "Legislative provisions designed to secure order, system and dispatch in proceedings are ordinarily directory where they are stated in affirmative terms." 158 Conn. at . The provision from the civil penalty statute at issue is of this nature. Thus one meaning of the passage is that the timing of notice is within the commissioner's discretion. The statute sets out seven criteria, including "the amount of the assessment necessary to insure immediate and continued compliance (Section 2(c)(1)) which the commissioner can consider in setting the penalty (Section 2(c)). It is reasonable to assume that the legislature intended him to have the discretion to delay issuing a notice until he had sufficient information to consider those of the criteria which he deemed relevant. It would be difficult to determine what penalty would meet the criterion of Section 2(c)(1) without knowing the cost of compliance and therefore the economic benefit of noncompliance. It is clear that cost of compliance data could be unavailable for a long period after discovery of the violation. Similar arguments could be made about other criteria in Section 2(c). Furthermore the statute specifically provides that:

> The provisions of this act are in addition to and in no way derogate from any other enforcement provisions contained in any statute administered by the commissioner. The powers, duties and remedies provided in such other statutes, and the existence of or exercise of any powers, duties or remedies hereunder or thereunder shall not prevent the commissioner from exercising any other powers, duties or remedies provided herein, therein, at law or at equity.
> Section 2(i).

It is clear from this provision that the civil penalty is to be used in a way that will not weaken the commissioner's other enforcement tools. However, if he did not have discretion to delay imposition of the penalties it might detract from his ability to use other enforcement devices such as negotiation.

On the other hand it could be argued that the statute does not provide for such discretion. The word "may" does not always connote discretion. In several cases the Connecticut Supreme Court has held that: "The provision that the (Medical Examining) board 'may accept' a license issued in another state is mandatory, entitling an applicant to a certificate as of right if the requirements of the statute are fully met." State ex rel Baskin v. C. J. Bartlett, 13 CS 463 (1945). In State ex rel Markley v. Bartlett, 130 Conn. 88, 93, the Connecticut Supreme Court went even further:

> "The accepted rule in such cases is that if, in a statute conferring power and authority for the benefit of the public, or of a third person, or of individuals generally, the word 'may' is used, it shall be construed as equivalent to 'shall,' and that the statute is mandatory and not permissive or discretionary" quoting from State ex rel Foote v. Bartholomew, 103 Conn. 607, 612.

However, in the Markley case the Court was dealing with a limited situation, one in which an administrative officer was given a power "for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise." 130 Conn. 88, 94. The basic purpose of the law was the screening of doctors to protect the Connecticut public, but it also dealt with the basic right of individuals to practice their profession. This can easily be distinguished from the broad regulatory purpose of the civil penalty statute

In the Foote case (State ex rel Foote v. Bartholomew, supra) the Connecticut Supreme Court considered the use of "may" in a broader situation. In that case a taxpayer sought a writ of mandamus to compel the board of tax relief to place certain property on the tax rolls. The court held that although the statute in question stated that the board "may" place property omitted by the assessor on the tax list, it was mandatory and created a duty. It argued that the amount of an assessment was within the discretion and expertise of the assessor but the question of whether property was taxable was a question of law and not within the realm of discretion. Foote, supra, 612-617.

Both the situation in the Markley case and that in Foote can be distinguished from the case of the civil penalty statute. In both of those situations the administrative body was empowered to make a single yes/no determination in carrying out its duty to the public. However, the civil penalty is but one of many enforcement tools available to the commissioner. The decision to invoke it or delay its use is not the decision to pursue an alleged violation or ignore the violation. Thus the public is not harmed by allowing the Commissioner discretion and neither is the violator. The statute and regulations themselves put the violator on notice of his potential liability for a civil penalty. The statutory procedure also guarantees that the violator will have notice of the commencement of civil penalty proceedings and an opportunity to be heard prior to the assessment of any penalty. These protections are not weakened by the procedures set out in Option One. If anything they are strengthened.

It can be argued further that the statutory mechanism was intended to be the sole procedure used in assessing civil penalties. With regard to the timing of the issuance of a notice violation, Section 2(d) could be read literally to require that the commissioner issue the notice as soon as he had probable cause to believe a violation had occurred (if "may" were interpreted to mean shall) or to require that he choose between issuing the notice at that time and not invoking a civil penalty at all (if "may" were read in its discretionary sense). With regard to the additional notice and hearing procedures suggested in Option One, it should be noted that the act provides for no such procedures, and does not specifically authorize the Commissioner to vary the procedures prescribed. If the Legislature had intended to empower the commissioner to take such actions it would have done so with clear statutory provisions. The statute does specifically give the commissioner discretion in several areas. (R.G. Section 2(c) and (e)). It could be argued that the Legislature intended to limit the areas of discretion to those specifically identified. On the other hand, the Legislature would have made this limitation expressly in the statute.

Option Two, the maximum/mitigation option, is more in tune with the language of the statute than is Option One. The statute clearly gives the commissioner great leeway in setting the penalty to be stated in the notice of violation. He could clearly levy the maximum penalty without violating the statutory provisions. Section 2(c) provides that "in setting a civil penalty in a particular case, the commissioner shall consider all factors which he deems relevant, including, but not limited to "seven enumerated criteria." The statute sets maximum penalties (Section 2(a)(1)(4)) and requires the preparation of a schedule of penalty amounts or ranges of amounts (Section 2(a)). It is clear that these provisions are the only limitation the Legislature sought to impose on the commissioner's discretion to set penalties in individual cases. The statute is equally clear in granting the commissioner discretion to mitigate penalties in individual cases. Section 2(e) provides that: "Any civil penalty may be mitigated by the commissioner upon such terms and conditions as he in his discretion deems proper or necessary upon consideration of the factors set forth in subsection (b) (sic, should read (c)) hereof." Thus the statute provides clear authority for the commissioner to follow the procedures of Option Two.

Option Three, on the other hand, appears to fly in the face of statutory language. In this option a formula would be used as the amount of the penalty in the notice of violation. Section 2(d) provides that the notice sent by the commissioner to the violator "shall include:.... (3) A statement of the amount of the civil penalty or penalties to be imposed..." The question here turns on the meaning of the word "amount." Black defines amount as "the effect, substance, or result; the total or aggregate sum." Black's Law Dictionary, 4th Ed. 1968, p. 109. It is also defined as "A sum total of numbers of quantities;.... A quantity viewed as a total; aggregate; totality," Funk & Wagnall's, supra, p. 94. The word has been given a similar meaning by several courts. "'Amount' means the sum total of two or more sums or quantities; the aggregate and is synonymous with rate.[1] Smith v. Board of Policemen's Pension Fund of City of Des Moines, 238 Iowa 127, 128 25 NN 2d 858. An amount need not be a simple monetary sum. A constitutional requirement of a statement of an amount has been held to be satisfied by a statement of a percentage figure where a simple arithmetical figure was sufficient to calculate the correct amount. Alidor v. Mobile County Commission, 284 So. 2d 257, 291 Ala. 552. It is possible that this argument could extend to the use of a more elaborate formula if it were easy to understand and use and if the information necessary to use it were readily available. However, this is not the case with the civil penalty formula based on cost of compliance. The violator would be in a better position than the commissioner to calculate the cost, but this would still require substantial effort in many cases and probably would not satisfy the statutory mandate. It should be noted that little authority has been found on this point and additional research will be conducted in an attempt to further clarify this question.

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[1] Other cases distinguish "amount" from "rate" in Naylor v. Board of Education of Fulton County, 288 SW 690, 692; 216 K 766, the court held a notice of election to levy a school tax which gave

In conclusion the statute clearly allows one option, is ambiguous concerning a second and is in opposition to the third. Option Two does not require any deviation from statutory provisions. Option One provides for extra-statutory procedures and for a somewhat liberal interpretation of the statutory provisions. Option Three requires an extremely liberal interpretation of the statute. The question of the legal status of Options One and Three thus depends on the construction of the statute by the courts, and on the extent of the discretion of the commissioner to interpret, modify, and supplement the procedural provisions of the civil penalties statute. These issues are discussed in the following sections.

Administrative Discretion and Deferral Options One and Three

There are four questions of interest in this section. The first three relate to deferral Option One. First, does the Commissioner have discretion to make a liberal interpretation of statutory provisions where the statute is somewhat ambiguous, but does not specifically grant broad discretionary powers to use its provisions? Second, does the Commissioner have discretion to delay certain procedural steps set out in the statute to ease the administrative burdens of the statutory program or increase its effectiveness? Third, does the Commissioner have power to supplement the procedures laid out in the statute with additional procedures? The fourth question deals with Option Three. Does the Commissioner have discretion to depart from reasonably straightforward statutory language? In order to address these questions we must look to the basic limits of administrative power and discretion.

Administrative agencies are often said to have enormous discretionary power. This is particularly true in fact-finding where the agency is exercising its expertise. In such cases courts are extremely reluctant to overturn administrative decisions. The courts will only do so if the agency acted in a way that was clearly illegal, arbitrary or in abuse of discretion

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the rate of tax to be raised to be in violation of the statute which required that the amount of tax be set out in the notice. See also Hilburn v. St. Paul, M. & M. Ry. Co., 58 P 551, 23 Mont. 229.

and such findings are rare. See Hotchkiss Grove Assn. v. Water Resources Commission, 161 Conn. 50, 282 A. 2d 890 (1971); Mills v. Town Plan and Zoning Commission of Town of Windsor, 145 Conn. 237, 140 A. 2d 871 (1958); Charchenko v. Kelley, 140 Conn. 210, 98 A 2d 915 (1953); Torello v. Board of Zoning Appeals of New Haven, 127 Conn. 307, 16 A. 2d 591 (1940); and Piccolo v. Town of West Haven, 120 Conn. 449, 181 A 615 (1936); Blesso v. Board of Plumbing and Piping Examiners, 30 CS 262 (1973). The Mills case, supra, was one such rare case. In that case the courts overturned a decision of the Town Plan and Zoning Commission which changed a zoning plan and the zoning classification of a certain property. The court based its decision on the fact that the commission had rejected an application for a similar change affecting the same property one month previously and there had been no showing that the reasons for the previous denial had been eliminated. The court held that the decision was arbitrary and overturned it.

The Blesso case, supra, is an example of a case in which the court upheld an agency action after a rather cursory review of the facts. In Blesso the Board suspended the license of a plumber upon a finding that the licensee's apprentices did not work under direct supervision of licensed contractors as required by the regulations. The court observed that the Board had administrative discretion; that its review was limited to the question of whether the Board's action was arbitrary, illegal or unreasonable, and that the evidence was sufficient to sustain the Board's finding. The standard of illegality, arbitrariness or abuse of direction is general and cases are treated on an ad hoc basis.

The standards for reviewing the rule-making activities of administrative agencies are also broad, but in such cases the courts have a standard on which to base their judgment--the underlying statute itself.

In identifying the specific regulatory powers held by an agency the courts look to the statutory authorization and the basic purposes for which the agency for which it was established.

> It is clear that the Danbury planning commission can exercise only the powers which are expressly granted to it by statute or such as are necessary to enable it to discharge the duties and carry out the objectives and purposes of its creation.

> Aunt Hack Ridge Estates, Inc. v. Planning Commission
> 160 Conn. 109, 115 (1970).

The requirement that the regulations have a firm statutory basis was well put in the following excerpt from an opinion of the U.S. Supreme Court affirming a decision of the U.S. Circuit Court of Appeals for the Second Circuit.

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.
>
> Manhattan Co. v. Commissioner, 297 U.S. 129, 134 (1936).

In the Manhattan Co. case the court ruled that a regulation of the Treasury Department was invalid after a thorough analysis of the statute and the effect of the regulation.

The Connecticut courts have stated the basic limitation on agencies' rule-making powers in a somewhat different fashion.

> No administrative or regulatory body can modify, abridge or otherwise change the statutory powers under which it acquires its authority unless the statute specifically grants it that power. South East Property Owners and Presidents' Association v. City Plan Commission, 156 Conn. 587, 592 quoting from State ex rel Huntington v. McNulty, 151 Conn. 447, 449 (1964).

Similar language was also used in Hartford Electric Light Co. v. Sullivan, 161 Conn. 145, 155 (1971); Finn v. Planning and Zoning Commission, 156 Conn. 540, 546 (1968) (quoting the Huntington, supra, language); Hammenberg v. Holloway, 131 Conn. 616 (1945); State ex rel Baskin v. C. J. Bartlett, 13 C.S. 463 (1945) (quoting the Manhattan Co., supra, language); Oles v. Liquor Commission, 10 CS 489, 492, 493 (1942).

In all of the above cases the courts invalidated regulations as attempts at unauthorized amendments, modifications or abridgements of statutes.

In Hartford Electric Light Co. v. Sullivan, supra, a statute provided for tax assessments on certain specified assets. The State Tax Commissioner had by regulation provided for assessment on a broader class of assets due to a mistaken interpretation of the statutes. The Court held that the regulations were invalid because they were broader than the statutes authorized and because there was no clear grant of power in the statute for the Commissioner to go beyond the statute in rule-making.

In South East Property Owners and Resident's Association v. City Plan Commission the commission enacted a regulation setting a maximum length for a certain type of street in subdivisions. In another regulation it set up a procedure for granting variances from the other regulations. The court found that the statute did not authorize the Commission to grant variances and therefore voided the offending regulation.

In Finn v. Planning and Zoning Commission, supra, the statute in question (CGS Section 8-26) required that the Commission act on submitted plans within 60 days, and made failure to do so operate as approval. The Commission promulgated regulations setting up a two stage procedure. The first step called for the submission of an initial plan for preliminary approval. After approval the applicant had 90 days to submit a final plan on which the Commission would act within 60 days. The scheme was a clear-cut attempt to draw out the approval process to enable it to do a better job. The court invalidated the scheme. It first noted that there was no provision in the relevant statutes (Sections 25, 8-26 CGS) giving specific authority to the Commission to provide for such a procedure. It then noted that "the whole field subdivision regulation is peculiarly a creature of legislation," quoting from 2 Yokely, Zoning Law and Practice (3rd Ed.) Section 12-3. The next link in its reasoning was the following argument:

> In order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather we must search for statutory authority for the enactment. 156 Conn. at 545 quoting from Avonside, Inc. v. Zoning and Planning Commission, 153 Conn. 232, 236.

Finally the court noted that the statute provided for a single application to which the agency was to respond within 60 days. The regulations provided for an application and a plan submission but the court argued that in fact this meant two applications and was an unauthorized administrative change in the statute.

The Finn case is of particular relevance to the civil penalty deferral question. There are some parallels between the Finn commission's scheme and deferral Option One. The purpose of both is to put off the official administrative determination so that the administrators could operate on a more informed basis. Environmental protection would appear to be as much a creature of legislation as is zoning. There are also important differences, however. The subdivision statute set a final deadline for completion of administrative action. The civil penalties statute has no such deadline. The delay in the subdivision case can well be costly to the applicant as it delays the development of his or her land. In the civil penalty case there is no harm to the violator unless the penalties accrue during the period of delay (which might be the case). Moreover, the guarantee of actual notice of potential civil penalty liability to the violator contemplated in Option One would give the violator an opportunity to avoid detriment by rapidly complying with an abatement order. The applicant had no such option under the Finn procedure, and the court noted that the 60-day limit was "for the protection of the subdivider." 156 Conn., at 544.

Hammerberg v. Holloway, supra, involved regulation of milk prices. The price was to be determined in part by the butterfat content of the milk, which was to be determined by a standard test, the steps of which were set out in the statute. The commission used a variant of that testing procedure which significantly raised the possibility of inaccuracy. This procedure was apparently within the commission's regulations, but the court overturned commission pricing decisions based on the deviant testing. It noted that the power to promulgate regulations did not empower the commission to override the express provisions of the statute.

The case of Oles v. Liquor Central Commission, supra, involved a commission regulation calling for the certification of all employers of liquor permittees. This was promulgated pursuant to a statutory provision prohibiting the employment of persons in liquor-selling establishments who did not meet the standards required of permittees. A certification system for permittees was in effect and had been upheld. A lower court overturned the regulation holding that the certification of all employers in question was such an enormous task that the legislature could not have intended that the commission undertake it.

This list of cases indicates that the Connecticut courts will look closely at challenged regulations to determine if they are authorized by the relevant statutes. They also suggest certain factors to which the court pays special attention and shed some light on the questions raised concerning deferral Options One and Three. Before addressing these questions, however, we will look at two cases in which the court refused to overturn regulations even though they went beyond the specific language of the statute.

The cases in question are Dadiskos v. Liquor Control Commission, 150 Conn. 425 (1963) and John J. McCarthy C. v. Aesop, 122 Conn. 288 (1936).

In Dadiskos, supra, the court was faced with a statute that set out several grounds for the revocation of liquor permits and regulations that prescribed additional grounds. The court held that the regulations were valid. In part the division was based on the fact that the statute included a broad grant of powers. It authorized the commissioner to make all regulations necessary to enforce the provisions of the act and to ensure the proper, safe and orderly conduct in establishments with liquor permits. It is important to note that the statutory grant of power clearly went beyond the enforcement of the statute.

The McCarthy Co. case, supra, involved a statute requiring the Public Utilities Commission to issue common carrier licenses only to persons who had adequate financial responsibility. The court upheld regulations requiring carriers to hold insurance with a Connecticut-based company as a reasonable means of effectuating the statutory mandate.

These cases suggest several general lessons about regulatory power. First, the courts do not look with favor on regulations that go beyond the specific authorizing language of the statute. However, where the statutory authorization goes beyond the enforcing act, even in very general terms, courts will uphold administrative modification of the statutory regulation scheme. It is not clear from the cases in which regulations were invalidated if the statutes involved included broad grants of power such as that in the Dadiskos case, supra. The fact that the point was not raised suggests that the statutes did not include such provisions. Further research can clarify this point. At any rate, it appears that the courts view specific grants of authority as limiting provisions, but grant substantial discretion where there is language suggesting a broad grant of power. This suggests that the regulations issued under the civil penalties statute that do not have a clear basis in the specific provisions of the statute may be in trouble.

The above cases suggest that the Commissioner's discretion to modify or depart from the statutory procedures is limited in all four areas addressed by questions at the beginning of this section. With regard to the Commissioner's intrinsic authority to interpret ambiguous statutory provisions, it seems clear that an administrator must have such power if he is to effectively implement the statute. However, the above cases suggest that in the absence of a broad grant of powers, the Commissioner could not use an ambiguous provision as a source of specific powers unless there was a reasonable interpretation of that provision that would authorize such powers. As to the question of delaying statutory procedures, the Commissioner's leeway again appears to be limited. On the one hand the civil penalties are intended to be used in conjunction with existing enforcement measures. This argues for discretion to delay issuing a notice of violation while determining whether this was an appropriate case for such a remedy. On the other hand the statute provides for notice to people who are assessed penalties and because penalties mount during the delay, lengthy delays would frustrate the aim of the statutory notice provision. There are also limits to the Commissioner's discretion to implement extra-statutory procedures. This would appear to be possible where the procedures clearly supplemented statutory procedures. However, in the absence of a broad grant of powers, procedures correlated to any statutory purpose would not be authorized. Finally, the above cases indicate that the Commissioner does not have discretion to interpret a word or language in the statute as having a meaning other than it is commonly given. Such discretion would exist only if there were a clear statutory authorization for it.

Another point can be drawn from the cases just discussed. With the exception of the McCarthy Co., supra, and Oles, supra, and South East Property Owners and Residents' Association cases, supra, each case involved a party or parties who stood to suffer a clear-cut loss from the enforcement of the regulations in question. In The Hartford Electric Light Co. case, supra, the loss was a substantially increased tax bill; in the Finn case, supra, it was a possibly long delay in the start of land development; in the Hammerberg case, supra, it was profits of approximately $1600; in the Dadiskos case, supra, it was a liquor permit. In the Oles case, supra, the regulation required a tremendous increase in administrative costs and in the South East Property Owners case, supra, the regulation may have affected the safety of property values in a sizable neighborhood. In contrast, it is difficult to see what serious adverse affects would be caused for anyone by any of the regulations contemplated in the deferral options. There is no case language to suggest that this would sway a court, but it does lay the foundation for an argument that the deferral options do not represent a significant expansion of the Commissioner's power over that set out in the statute.

INTERPRETING "AMOUNT" AS "RATE"

This memo recapitulates the research of the memo concerning statutory interpretation and applies its conclusions to the question of whether the word "amount" in §2(d) of the Enforcement Act may be interpreted to mean "rate." If this interpreation is permissible, the Department can avoid premature assessment estimates by including the formula, rather than a dollar figure, in the Notice of Violation.

"Amount" is defined as an "aggregate" or a "totality," and thus differs conceptually from "rate," which must be understood in relation to other factors. Thus, a strict application of the "plain language" doctrine would seem to preclude the Department's preferred interpretation.

Section 2(c), however, requires the Commissioner to consider at least seven factors about which he could not possibly have information at the time of detection. Thus, a counter-argument might be advanced that a strict interpretation of "amount" would negate the purposes of 2(c) and constitute a "bizarre result." If this counter-argument is not conclusive for the Department, it may at least establish an ambiguity in the statute, in which case the legislative history of the Act, the administrative interpretation and the breadth generally accorded remedial policies should weigh heavily in the Department's favor.

STATUTORY CONSTRUCTION AND THE ISSUE OF AMOUNT VS. RATE

The desirability of interpreting the word "amount" in Section 2(d) of the Enforcement Act to mean "rate" is based on the fact that the Commissioner does not have access to adequate information at the time of detection and for a long while thereafter. The word "amount" does not appear to have been judicially interpreted in Connecticut. In construing the term, six rules of statutory construction may have some applicability:

1. The Plain Language Doctrine.
2. The Bizarre Result Doctrine.
3. The Resort to Legislative History and Statutory Purpose Rule.
4. The Administrative Agency Interpretation Rule.
5. The Remedial Statute Rule.
6. The Penal Statute Rule.

The primary rule of statutory construction in Connecticut is the "plain language" doctrine. It is the expressed intent of the legislature which controls construction, and that intent is to be found in the meaning of what the legislature says and not in some unexpressed or supposed state of mind. See, e.g., Kellems v. Brown, 313 A. 2d 53, 163 Conn. 478 (1973) appeal dismissed 409 U.S. 1099. The cases in support of this principle are legion.

This principle creates a great problem. Black defines "amount" as "the effect, substance, or result; the total or aggregate sum." Black's Law Dictionary, 4th Ed. 1968, p. 109. Funk & Wagnalls defines amount as "A sum total of numbers or quantities;...A quantity viewed as a total; aggregate; totality." Thus, a plain language reading of "amount" seems to preclude grafting onto its definition a monthly rate and formula.

The major exception to the plain language rule is the "bizarre result rule." Statutory construction which enables a statute to become effective and workable is to be preferred over one leading to an obviously unsupportable and bizarre result. See, e.g., United Aircraft Corp. v. Fusari, 311 A. 2d 63, 163 Conn. 401 (1972), and State v. Anonymous, 310 A. 2d 609, 30 Conn. Supp. 267 (1973). A good case can be made that prohibiting the use of a "rate" in the notice of violation is in obvious contradiction to Section 2(c) requiring the Commissioner to set penalties in particular cases only after consideration of seven criteria about which he cannot possibly have adequate information at the time of detection. This is the best support for the inclusion of the term "rate" in the notice of violation.

If the "bizarre result" theory is not conclusive for DEP it ought to at least demonstrate the ambiguity in Section 2(d) (use of the term "amount") when read in conjunction with Section 2(c) (assessment criteria). A third rule of construction is that ambiguity in the meaning of a term will lead the court to review legislative history, the general purposes of the Act, etc. Housing Authority of City of Waterbury v. White; 287 A. 2d 644, 29 Conn. Supp. 346. Since the legislative history, and purposes of the Act on this point are also ambiguous, it will be necessary to look for further guidance.

A fourth rule of construction is that an interpretation of a statute by those charged with administering it is entitled to great weight. Doe v. Shapiro, 302 F. Supp. 761 (1969), appeal dismissed 396 U.S. 488, rehearing denied 397 U.S. 970. Furthermore, if an administrative interpretation has been acted on for a number of years it will not be disturbed except for very cogent reasons. State ex rel Bezzini v. Hines, 14 Conn. Supp. 246, no error 53 A. 2d 99, 133 Conn. 592 (1946).

A fifth rule of construction, that remedial statutes will be given liberal interpretation, may also be significant upon a finding of ambiguity. State v. Vachon, 101 A. 2d 509, 140 Conn. 478 (1954). Thus, to the extent that DEP's proposed penalty is remedial, its calculation via notice of a "rate" ought to be permitted.

Unfortunately, the final rule of construction of import on this issue is that a penal statute will be construed strictly. However, as some cases make clear, strict construction of a penal statute is required so that the public is provided a precise definition of the forbidden act. Grievance Committee of the Bar of New Haven County v. Payne, 22 A. 2d 623, 128 Conn. 325 (1941). Thus, it is possible to distinguish those parts of a statute relating to liability (and requiring strict construction) from those parts dealing with procedural aspects of notice of extent of remedy (and therefore subject to a liberal construction).

To summarize, DEP will have immense difficulty with overcoming the "plain language doctrine." The only hope seems to be to convince the court that a limited reading of the term requires the Commissioner to assess penalties in an irrational manner. This "bizarre result rule" then may prove conclusive. If not, it may at least establish ambiguity which DEP can use to argue its expertise and the liberal construction given to remedial statutes. Counter to these arguments is the narrow construction traditionally given penal statutes.

III THE ASSESSMENT PERIOD ISSUE

ASSESSMENTS FOR PAST DELAY

Unless past delay can be included in the assessment period, civil assessments will not fully compensate for the benefits accruing from dilatory conduct.

Past delay may be included in setting a civil assessment through either of two methods:

(1) The creation of a rebuttable presumption that the violation has been continuous and extends back to an appropriate initial date; or

(2) A policy declaration that the amount of the civil assessment will reflect the regulatee's failure to make the appropriate initial investment.

Both methods may be effectuated through either regulations or *ad hoc* decision-making.

The choice of creating a rebuttable presumption is constrained by the fact that the scope of judicial review accorded to evidentiary matters is broader than that accorded to policy-based determinations. Even if the presumption device is restricted solely to calculating the amount of the remedy, it is more likely to be reversed because it is in the traditional judicial province rather than in an area of special agency expertise.

On the other hand, legal precedent on both the federal and the state level indicates that there will be a great deal of discretion allowed in the determination of a remedial policy. The use of an investment decision date subsequent to the promulgation of the regulations does not violate due process and should be well within the discretionary range.

The choice between regulations and *ad hoc* decision-making is relatively free, but the emphasis upon control over discretion in the statute and its legislative history suggests that proceeding via regulation is the safer alternative.

TO: CPEP Staff

FROM: Andy Weissman

Subject: Legal Memorandum re Penalties for Past Delay

I. Scope of Analysis

The design of the civil penalties program is directed towards presenting the potential polluter with an investment decision for which the option of compliance with environmental standards will be marginally more favorable than that of continued violation and the risk of a civil penalty. In order to further the objective of immediate, voluntary compliance, it is essential that the penalty scheme creates incentives which can overcome the tendency to postpone compliance until state investigators have detected a violation. This means that the penalty formula must take into consideration the period of delay between either the effective date of the controlling regulations, or the commencement of operations by a polluter, whichever is later, and the date of detection of a violation. Including this pre-detection period of violation in determining the amount of a penalty is doubly important because it serves to compensate, to some extent, for the advantage that the non-complier has enjoyed over competing firms which have conformed to environmental restrictions more quickly.

The purpose of this memorandum is to set forth the legal considerations and constraints relating to the inclusion of this pre-detection period of "past delay" as a factor in determining the size of a civil penalty. The discussion will be limited to the legal arguments, and will not include the multifarious policy considerations which should determine the course of action when a choice between several options is available.

II. Conclusions

There are several possible means by which the period of past delay may be included in setting a civil penalty. The actual substantive choice of methods for doing this is twofold:

1) A policy declaration that the fact of detection will create a rebuttable presumption that the violation has been continuous and extends back to an appropriate initial date.

2) A policy declaration that the crux of the civil penalty enforcement system is the choice of an investment on an initial date, and that the penalty will therefore reflect the failure to make that initial investment at any time during the period of delay.

Both of these methods may be effectuated in either of two procedural manners:

1) Inclusion in properly promulgated regulations.

2) Development of the policy rule in the process of ad hoc decision-making.

Together, these two sets of two options present four choices from which to choose a Department policy. The legal risks attendant upon each of these four options vary, and will be discussed at length in the body of this memorandum, but several judgments can be briefly stated.

First, the choice of creating a rebuttable presumption that a violation extends back may be dangerous in that it operates as an admission that the penalty calculation will be an evidentiary matter rather than a policy choice, and, although administrative finders of fact have great leeway, there are indications that the scope of review will be stricter with respect to evidentiary conclusions concerning the presence of a violation than it will where choices between remedies are concerned. At the very least, this indicates that any presumption should be clearly stated in terms of facts considered for the purposes of forming the penalty rather than finding a continuous series of violations. As a result, the size of the additional penalty for past delay is limited by the $25,000 maximum set by the statute. Even if a presumption relates only to facts relevant for remedial purposes, it is probable that judicial review will be stricter than the policy-based determination, if only because judges have a greater confidence in judging evidentiary matters than in overturning an administrative choice relating to an area of special expertise.

Second, the legal precedent indicates that there will be a great deal of discretion allowed in the determination of a policy calculated to effectuate the terms and intent of a statute. Certainly the rationale for determining a penalty in terms of the investment decision made after a polluter knew that the civil penalties regulations were in effect should be sufficiently well-reasoned to qualify as being within the range of reasonable administrative choice.

Third, the choice between effectuating the policy or presumption of fact by means of regulation or ad hoc decision is a relatively free one. The legal precedent generally favors a flexibility in this regard, and several ad hoc alterations of existing policy have been upheld despite the lack of advance notice and the presence of some degree of reliance on past decisions. The civil penalties statute, however, and, to a greater degree, the sense of the statute created during legislative debates, may constrain this choice due to an emphasis upon maintaining control over the Commissioner's discretion in levying a penalty.

Fourth, whatever the policy choice is concerning these options, a full opportunity for the presentation of all evidence relevant to any presumption or policy choice should be provided. In addition, it would be wise to clearly state prior to any quasi-judicial decision the basis upon which a penalty will be calculated. Problems of notice and due process proliferate the cases concerning administrative adjudications, and every effort should be made to avoid these. Once the evidence is fully and fairly before an administrative tribunal the likelihood of judicial reversal, either upon grounds of ultra vires policy choices or the sufficiency of the evidence, is slim.

III. Policy-making Discretion of An Administrative Agency

The breadth of discretion accorded to an administrative agency in determining policies calculated to effectuate the provisions of statutes which are within the scope of their delegated powers is considerable, but not unlimited. This discretion is most often discussed in the context of the two basic methods of effectuating administrative policies: The promulgation of rules and regulations, and the formulation of remedies following administrative adjudication. In both situations, restrictions upon administrative policy choices have been extremely limited, and, as a result, it seems unlikely that a carefully planned use of either method will result in judicial reversal.

A. Discretion re Rule-Making Powers

The scope of the rule-making powers of an administrative agency is broad, and its limits are a function of the purposes and policies set forth in the enabling legislation. The Connecticut Attorney General, 30 Op. At. Gen. 135 (March 24, 1958), described the limitations on these powers as follows, quoting from 73 C.J.S. Section 95 at page 417:

> "[A public administrative officer] may make or adopt only rules and regulations which carry into effect the will of the legislature as expressed by the statute, ..."
>
> "[He] may not make or adopt a rule or regulation in contravention of, or out of harmony with, a statute, ... and he may not, by the adoption of a rule or regulation, amend, alter, enlarge, or restrict the terms of a legislative enactment. [He may not], under the guise of regulation, ... change the purpose and the effect of the law."

The Connecticut Supreme Court has stated rules which differ from the above opinion semantically, but not in substantive content. Thus, in John J. McCarthy Co. v. Alsop, 122 Conn. 288 (1937), the Court stated that a regulation by the Public Utilities Commission must be promulgated "by virtue of express provisions of law" or they must be rules "such as are by fair implication and intendment incident to and included in authority expressly conferred." In Loglisci v.

Liquor Control Commission, 123 Conn. 31 (1937), the rule stated was that "the authority of the administrative body acting under [a legislative] grant of power, is limited to the making of reasonable rules and regulations within the scope of the power granted."

The generality of all of these rules indicates that each situation is decided upon its own facts, largely on an *ad hoc* basis. Where challenged regulations are approved, generally the judicial opinion will state the general rule and conclude that the agency has not stepped beyond its bounds. The decisions overturning adopted regulations can, however, indicate the limitations upon agency discretion in this regard. In *Oles v. Liquor Control Commission*, 10 Conn. Sup. 489 (1942), the statute provided that no person declared "unsuitable" could be employed on any premises where liquor was sold for immediate consumption. The Commission adopted regulations requiring all such employees to obtain a certificate of approval from the Commission as a prerequisite for employment. Under the applicable statute, the Commission had the general power to do what was "reasonably necessary for the carrying out of the intent" of the statue. The court held the regulation invalid as an attempt to legislate, unreasonable and arbitrary since no contemplation of an extensive employee permit system could be attributed to the statute.

In *State ex rel. Baskin v. Bartlett*, 13 Conn. Sup. 463 (1945), the Medical Examining Board adopted regulations which required doctors with out-of-state licenses seeking a Connecticut license to take an oral examination with no notice of the content of the examination, and no written evaluation of performance. The court held that although the Board had been granted the power to establish regulations controlling the licensing of out-of-state doctors, the particular rules promulgated were "out of harmony" with the statute, which had provided for a written examination for another class of license applicants.

In comparison to these cases, the Court in *Dadiskos v. Liquor Control Commission*, 150 Conn. 425 (1963), upheld a regulation which added additional grounds for revoking a liquor permit to those enumerated in the statutes. Here the Court emphasized the general grant of administrative powers necessary to ensure proper, safe and orderly conduct.

The generality of the guiding principles, and the fact that each case is decided on its own facts makes the law for any given situation unpredictable. One factor remains constant: the court will look to the statute to test whether there was authority for the regulations, either expressly stated, reasonably implied, or arising out of the role of the agency as the vehicle for furthering statutory purposes. With this in mind, one must look to the civil penalties enabling act (Public Act No. 73-665) to support proposed regulations enforcing a penalty for past delay. Under the statute, Section 2(a), the Commissioner is "authorized" to adopt a schedule of the amounts, or ranges of amounts, to be assessed for each of the various types of infractions. In adopting this schedule, he must consider the factors set forth in Section 2(b). The inclusion of an amount for past delay within the schedules would be supported in the statute by the provision, in Section 2(b), that "the commissioner shall consider the amounts...of assessment necessary to insure immediate and continued compliance...." The penalty for past delay, specifically designed to encourage immediate, rather than delayed, compliance, should clearly be in furtherance of this specific objective.

Section 2(c) provides guidelines for the determination of the size of a civil penalty by the commissioner. It states that he shall consider all relevant factors, and then lists seven enumerated factors, including the following:

1) "The amount of assessment necessary to insure immediate and continued compliance." [Sec. 2(c)(1)].

2. "The conduct of the person incurring the civil penalty in taking all feasible steps or procedures necessary or appropriate to comply or correct the violation." [Sec. 2(c)(3)].

3) "Any prior violations by such person of statutes, regulations, orders, or permits administered, adopted or issued by the commissioner." [Sec. 2(c)(4)].

Each of these considerations renders support for the additional penalty for past delay. The first, as discussed above, is exactly the objective of the added penalty. The second allows the commissioner to consider the degree of cooperation that the polluter has exhibited in the past. The third specifically mentions the importance of past "violations," but it is unclear whether "violations" are limited to those which have been proven using evidentiary submissions. Even if this were true, the third provision clearly states that the legislature contemplated that actions prior to the violation being considered should enter into the calculus of determining the size of a penalty. Finally, the commissioner may "deem relevant" additional factors, such as the competitive disadvantage suffered during the period of delay by firms which have voluntarily and responsibly complied with statutory requirements, when calculating the penalty.

Taken together, then, the various provisions of Section 2(c) supply a good deal of statutory support for any proposed regulation concerning a penalty for past delay.

B. Remedial Discretion

The law concerning the discretion of an agency in devising and determining appropriate remedies suffers from the same generality as it did with respect to the scope of rule-making power. It is natural that many of the standards are the same or similar since the manipulation of remedies is a policy-making tool that differs from rule-making only with respect to timing and the surrounding forum. Whereas the former tool is categorized as "quasi-legislative" and the latter tool is called "quasi-judicial," limitations upon both are determined by the general limitations upon policy-making by the administrative agency.

The remedial area does, however, generate its own case law, and, despite some aberrations, the resulting wide area of discretion comes across perhaps even more clearly than in the earlier discussion. For the purpose of clarity it is best to consider two separate issues: first, what is the measure of discretion where the formulation or choice of remedy is concerned; second, to what extent do administrators have the freedom to consider non-evidentiary facts in reaching their conclusions? The answers to both of these questions are important with respect to the choice of method by which a penalty for past delay is levied because the options include both ad hoc adjudicative remedy flexibility and non-evidentiary consideration of probable past, undetected violations (or failures to invest) as part of the penalty calculation.

(1) The Formulation of Remedies

The federal courts have considered the question of the scope of administrative remedial freedom in the context of federal agencies often, and the results tend to favor considerable discretionary leeway, but there are exceptions. An early case was F.T.C. v. Royal Milling Co., 288 U.S. 212 (1933), where the F.T.C. ordered the respondent to cease and desist from using a trade name which implied that they engaged in their own milling. The Supreme Court held that the remedy was too harsh. Trade names were valuable business assets, and the administrative order "should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." This purpose could be served less harshly by requiring only that proper qualifying words be used with the trade name.

A separate line of cases, concerning the National Labor Relations Board, began with Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943), where an employer had made check-off payments for employees' dues to a company union. After finding an unfair labor practice, the Board chose to require full reimbursement to the employees of all check-off payments as an appropriate remedy, despite the contention that the company union had provided some services to the workers. The Supreme Court upheld this choice of remedy with expansive language:

> "We give considerable weight to the administrative determination [that full reimbursement was necessary to effectuate the policies of the Act]. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (319 U.S. at 540).

The Royal Milling case, supra, underwent serious modification during this period. In Herzfeld v. F.T.C., 140 F. 2d 207 (3d Cir. 1944), Judge Learned Hand upheld a commission order prohibiting the use of the word "Mills" by the appellants in order to prevent the impression that they manufactured the rugs that they sold. Judge Hand stated that since Royal Milling the Supreme Court had considerably circumscribed the judicial powers of review over administrative remedies, and concluded:

> "Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme." (140 F.2d at 209).

Jacob Siegel Co. v. F.T.C., 327 U.S. 608 (1946), confirmed the drawback from Royal Milling. The court affirmed the power of the Circuit Court to modify an administrative remedy (here a cease and desist order prohibiting the use of a trade name) but reversed such an alteration because the agency had not exceeded its allowable leeway. The scope of judicial review was stated as extending "no further than to ascertain whether the Commission made an allowable judgment in its choice of remedy."

NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344 (1953), was the last case which undertook to support remedial discretion in an expansive manner. The Board had previously announced (in a prior adjudication) a policy of ordering back pay to reinstated employers to be computed on a quarterly basis. This formula, however, served in the present case to compensate the employee in an amount greater than his lost wages. The Court of Appeals modified the order so that the employees were made whole, but no more. The Supreme Court reversed this decision and held that the application of the Board's policy in the instant case was an acceptable discretionary choice regardless of the fact that no evidence on the record supported the quarterly back pay formula. Subject to limitations of fairness and effectuating the purpose of the Act, "the power [over the remedy], which is a broad discretionary one, is for the Board to wield, not for the Courts. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." (344 U.S. at 346). "The relation of remedy to policy is peculiarly a matter for administrative competence." (344 U.S. at 349).

The clarity of the prior cases has been obfuscated more recently. In Audivox, Inc. v. F.T.C., 275 F.2d 685 (1st Cir. 1960), the Court rewrote an order issued by the Commission to make it conform to similar orders issued against the competitors of the appellant, and thus prevent unjust financial hardship. The Supreme Court, in Local 60, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B., 365 U.S. 651 (1961), held that the Labor Board could not require a union to refund the dues and fees of its members when it engaged in an unfair labor practice by exerting coercion to create an unlawful closed shop. The facts revealed that no member had been coerced, and the Board's power was "remedial, not punitive." Compare the approach of the Court in Seven-Up, supra, when it stated that they preferred "to avoid entering into the bog of logomachy... by debate about what is "remedial" and what is "punitive." (344 U.S. at 348).

Gilbertville Trucking Co., Inc. v. United States, 371 U.S. 115 (1962), exemplifies the more recent ambivalent approach by the Supreme Court. The I.C.C. had disapproved a proposed merger and, after finding a de facto merger, ordered divestiture by one party of the stock of the other. Divestiture was clearly a remedy within the scope of the Commission's power. The Court remanded the case to the Commission, although it cited Siegel, supra, with approval: "Judicial review...'extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.'" The remand was ostensibly based upon the failure by the Commission to provide evidence that such a judgment was actually made. It is more likely, however, that the Court was trying to pressure a reconsideration of the remedy without actually overturning the Commission's decision. This becomes apparent when one considers the following statement, strangely juxtaposed with the quote from Siegel:

> "The choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives...." (371 U.S. at 130).

This apparent throwback to Royal Milling leaves the state of federal law somewhat unclear. The Siegel doctrine, however, still remains the law, and it is of some significance that the Court was unwilling to overrule the I.C.C. in the Gilbertville case, supra.

Cases from other jurisdictions generally support a considerable amount of remedial discretion, but not unanimously. In Tompkins v. Board of Regents, 299 N.Y. 469 (1949), New York's highest court reversed a lower court order annulling a determination by the Board to revoke a medical license. The Court approached the problem in a manner similar to Gilbertville, supra, by reminding the Board of facts in the record that should mitigate the penalty, and stating that such factors "should be significant to the Board in exercising its broad discretion that is beyond our power to review." The New York courts took the most extreme view of remedial discretion, as exemplified by Tompkins, supra, and Barsky v. Board of Regents, 305 N.Y. 89 (1953). In the latter case the Board suspended petitioner's license to practice medicine for six months. It was asserted that the remedy was too severe, that the Board had ignored important considerations, and that it had acted on matters not proper for consideration. The Court let the order stand saying: "it is enough to say that we are wholly without jurisdiction to review such questions."

The New York legislature responded with a statute which allowed the courts to pass on the issue of "whether the respondent abused his discretion in imposing the...penalty...involved in the determination." The effect of the statute can be seen in Mitthauer v. Patterson, 8 N.Y. 2d 37 (1960), where the New York City Transit Authority dismissed petitioner for theft while collecting train fares. The Court of Appeals upheld a lower court reduction of the punishment to a six month suspension, citing the newly passed statute, and despite the fact that the dismissal was not "shocking to one's sense of fairness." Since the statute merely allowed review of the issue of "abuse of discretion", the Court must have felt that such an abuse occurred even though the remedy was not patently unreasonable.

The "abuse of discretion" standard is prevalent in other states as well, including Connecticut (see discussion of Connecticut case law, infra). Thus, a New Jersey court described the remedial discretion of an administrative agency in this manner:

> "The remedy is peculiarly the province of the [Agency]. The measures taken to serve the [public] need are in no respect arbitrary or unreasonable, or an abuse of the statutory power.
>
> "We cannot in these circumstances substitute our judgment for the specialized judgment of the agency entrusted with the fulfillment of the legislative policy, for that would constitute the judicial exercise of the administrative function." In re Plainfield Union Water Co., 14 N.J. 296, 308 (1954).

A Pennsylvania court felt it could not "second-guess the imposition of penalties" under a civil penalty system for the enforcement of water pollution restrictions (35 P.S. Section 691.605), even though the size of the penalty was thought to be "unreasonable" and "would strike one's conscience as being unreasonable and would not 'fit' the statutory violation." The law required that the court "must find an error of law or an abuse of discretion" before it could modify a penalty. (The penalty was, in fact, mitigated because it had been illegally modified upward). United States Steel Corp. v. Department of Environmental Resources, 7 Pa. Cmwlth 429, 300 A.2d 508 (1973).

Two recent cases focus upon the need for legislative guidelines to reduce what would otherwise be unhampered agency discretion. The Maryland Court of Appeals invalidated a provision for a civil penalty on this basis in County Council v. Investors Funding Corp., 312 A.2d 225 (Md. Ct. of Ap. 1973). The Montgomery County Council had enacted a Landlord-Tenant Relations Act to regulate the apartment rental business and landlord-tenant relationships, and had provided for, inter alia, the power to impose civil penalties up to $1,000 for any violation, and the power to impose money damage awards to either landlords or tenants under conditions specified in the Act (Section 93 A-9, Montgomery County Code). The Court found that the lack of guidelines left the Commission with "unrestricted, unbridled discretion in fixing the amount of the penalty, within broad limits, up to $1,000 without regard to the nature or gravity of the violation." (312 A.2d at 246). The power to award money damages for actual losses suffered due to a defective tenancy was thought not to have this total discretion. As a result, only the civil penalties provision was overturned as an improper delegation of legislative powers. The importance of the decision for our purposes is, however, the fact that the Court was convinced that there was not even an "abuse of discretion" limit to administrative remedial powers under the statute.

In Rudy v. Hollis, 500 P. 2d 97 (Wash. 1972), a Washington statute (R.C.W. 49.60.225) authorized the State Human Rights Commission to award monetary damages up to $1,000 in compensation for the loss of the right to be free from discrimination in property transactions. The Court recognized that the provision of standards or guidelines by the legislature was necessary to define what is to be done and the administrative body which is to accomplish it, but that the statement that the purpose was compensation was sufficient to meet this need:

> "Standards to guide administrative action need not, and cannot, be perfectly specific. This is particularly so where the power which is exercised is quasi-judicial in nature... All that can, and should, be done is to define the conduct sought to be punished, or the injury to be compensated, set out the normally acceptable limits of punishment or compensation, and then allow the adjudicative body to determine the appropriate punishment or compensation by applying general principles of morality and traditional concepts of justice." (500 P. 2d at 100).

A final example of the extent to which a court will allow an administrative agency to make policy with remedial decisions can be seen in Jackson v. Concord Co., 54 N.J. 113 (1969). Here the statute provided that the Director of the Division on Civil Rights could issue orders to respondents and require that they "take such affirmative action..., as, in the judgment of the director, will effectuate the purpose of this act ..." The statute then lists several possible actions that might be required, not including the award of damages. Nevertheless, the court upheld an order which included compensation for added expenses incurred as a result of housing discrimination as within the broad range of administrative remedial discretion.

Exactly the opposite result was reached in Mendota Apartments v. District of Columbia Commission on Human rights, 315 A. 2d 832 (1974) where the court overturned an award of damages by the Commission when the enabling legislation provided that the Commission could order a violator "to take such affirmative action as will effectuate the purposes of this Article..."

Additional examples of judicial reversal of administrative remedies seem to be scarce. In York Telephone and Telegraph Co. v. Pennsylvania Public Utilities Commission, 121 A. 2d 605 (1956), the Court approved a civil penalty for the violation of an order requiring the hiring of additional cable crews for the purpose of telephone installation (under 66 P.S. Section 1491), but rejected an additional civil penalty based upon the failure to provide service, stating that this failure clearly was ancillary to the initial violation. This action, however, is best explained in terms of a review of the mixed legal and factual determination that two separate violations occurred, rather than as a review of the remedial decision. In Department of State v. Bewley, 272 A. 2d 531 (Pa. Cmwlth Ct.,1970), the revocation of a broker's license by the State Real Estate Commission was reversed, but the court based its decision on the principle that where there is administrative discretion in setting a penalty the agency should disclose the basis upon which it exercised its discretion (see the Gilbertville case, supra). And in each of three cases a Pennsylvania Court reduced administrative penalties from revocations to six month suspensions, but in each case there was also a finding of one or more unsupportable legal conclusions from the facts presented. State Real Estate Commission v. Campbell, 85 Dauph. 233 (Pa. Cmwlth Ct. 1966); Pennsylvania State Board of Pharmacy v. Pastor, 88 Dauph. 273 (Pa. Cmwlth Ct. 1967); State Real Estate Commission v. Bongiorno, 89 Dauph. 322 (Pa. Cmwlth Ct. 1968). The key element of these cases could be a closer scrutiny over legal conclusions than remedial choices, the former being less dependent upon administrative expertise than the latter.

The weight of the non-Connecticut precedent appears to support the contention that administrative remedial discretion is extremely broad and subject to few judicial modifications, except possibly where the penalty is closely connected to an ascertainable error in law or in the application of law to the facts. The Connecticut precedents are generally in accord with these principles as well. A typical and oft-cited Connecticut case is Jaffe v. State Department of Health, 135 Conn. 339 (1949), where the Medical Examining Board revoked the license of the appellant and the Court said:

> "On an appeal from an administrative board we have repeatedly stated that the function of the court is to determine whether or not it acted illegally; and while we have frequently added the words 'arbitrarily or in abuse of its discretion,' this merely points to certain types of illegality..."

This judicially declared narrow scope of review is reinforced by the provisions of the Connecticut Administrative Procedure Act, 4 C.G.S.A. Section 166 et seq. Section 4-183(g) of that Act sets forth the scope of judicial review over administrative decisions in part as follows:

> "The court may reverse or modify the decision if substantive rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) in violation of constitutional or statutory provisions;
>
> (2) in excess of the statutory authority of the agency;
>
> (3) made upon unlawful procedure;
>
> (4) affected by other error of law;

> (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The words of the A.P.A clearly reflect the rhetoric of the controlling case law, and it is necessary to examine the cases themselves to give substance to their general nature.

In Blesso v. Board of Plumbing and Piping Examiners, 30 Conn. Sup. 262 (1973), the Board found that the licensee had knowingly employed apprentices who did not work under the direct supervision of licensed contractors as required by regulation. The Court held that the Board's suspension of the license would be reviewed only to determine whether it was "arbitrary, illegal or unreasonable and an abuse of discretion vested in it."

In Konia v. Liquor Control Commission, 137 Conn. 327 (1950), the Commission revoked a liquor license and the Court of Common Pleas concluded that the penalty of full revocation was unreasonable, arbitrary, and excessive because appellant was only a first offender. The Supreme Court reversed, stating that "... it was within the power of the Liquor Commission either to revoke or to suspend his permit... It had a discretion as to which course it would follow." Reversal or modification of an order is appropriate "only in the event that the Commission has acted illegally, arbitrarily or in abuse of its discretion." The Court also stated that it was reviewing the appropriateness of the remedy "in view of all the facts which the Commission might reasonably have found."

In Spadaro v. Liquor Control Commission, 150 Conn. 68 (1962), the Court of Common Pleas again reversed a license revocation, this time for illegal gambling on the premises, and was again reversed by the Supreme Court. The decision of the Commission could not be disturbed "unless that decision was arbitrary, illegal or so unreasonable as to constitute an abuse of discretion." Other cases decided similarly are Paley v. Connecticut Medical Examining Board, 142 Conn. 522 (1955); and Manfredi v. United Aircraft Corp., 138 Conn. 23 (1951).

Two cases stated similar results, and clearly placed the burden of proof upon the appellant. Perdue v. Zoning Board of Appeals, 118 Conn. 174 (1934); Balog v. Liquor Control Commission, 150 Conn. 473 (1963). In the latter case the Court said that the "burden is to show that the action of defendant in revoking rather than suspending the permit was illegal, arbitrary, unreasonable or in abuse of its discretion."

A final case which emphasized the degree of discretion to be accorded with respect to remedial choices especially was Gibson v. Connecticut Medical Examining

Board, 141 Conn. 218 (1954) where it was asserted that the prescribed penalty of revocation was too severe. The Court said:

> "The situation is analogous to the imposition of a penalty by the court in a criminal case. If the penalty meted out is within the limits prescribed by law, the matter lies within the exercise of the court's discretion and cannot be successfully challenged unless the discretion has been abused." (141 Conn. at 230).

The only Connecticut cases which could be found that reduce the force of the precedent discussed above are Peters v. Shapiro, 5 Conn. Cir. Ct. 603 (1969), and Dempsey v. Tynan, 143 Conn. 210 (1956). The Peters case concerned the refusal by the Welfare Commission to allow dental work for the appellant. The Court recognized the purpose of allowing administrative agencies a great degree of flexibility, but concluded that this flexibility could not "go so far as to justify orders without a basis in evidence having rational probative force." The Dempsey case involved a provision by which the Commissioner of Motor Vehicles can suspend the license of a driver after an accident if the driver fails to provide security to cover possible liability. The Commissioner determines the necessary amount of security up to $20,000 for personal injury and $1,000 for property damage. The Court found that it was an abuse of discretion for the Commissioner to set an amount of $800 security while refusing to accept any evidence of an attachment which provided $800 security unless the victim said he was fully satisfied with the attachment alone. Clearly, both of these cases are minor difficulties when compared to the number of cases upholding remedial discretion. They do, however, suggest that any scheme which is adopted should provide for both fully articulated reasoning, factual findings, and policy judgments at the time a civil penalty is enforced by a final order of the administrative tribunal, and a complete and exhaustive opportunity for the violator to present any and all facts relevant not only to the finding of a violation, but to the penalty determination as well.

What conclusions can be wrought from the totality of cases, federal, out-of-state, and Connecticut? The Connecticut precedents clearly indicate a tendency to restrict the scope of review over remedial decisions to abuses of discretion or illegal acts. Under this test any scheme arguably related to the purposes of the civil penalties statute and clearly adaptable to particular factual deviations should be sufficient. However, the Connecticut courts have not yet faced a highly discretionary remedial scheme like the civil penalties program (as opposed to revocation/suspension choices) and the federal and out-of-state precedent is helpful in ascertaining a probable response in this regard. The Connecticut courts have reviewed highly variated remedial determinations in the workmen's compensation field, but have not decided the cases by reviewing the size of the award, but rather discussing the validity of factual findings. See, for example, Balkus v. Terry Steam Turbine Co., Conn. Law Journal, August 27, 1974 at p. 17.

The federal and out-of-state cases are not conclusive, but the greater weight is in favor of allowing a broadly discretionary remedial scheme with a scope of review similar to the Connecticut test of illegality or abuse of discretion. The federal cases in particular, despite some irregularity, are cited in the relevant literature in support of this contention. Davis, Administrative Law Treatise, Section 15.02; Jaffe, Judicial Control Over Administrative Action at p. 266. In all, the force of the law appears to be behind any novel remedial scheme which meets the requirements of furthering the purposes of the statute and avoiding arbitrariness, especially where the particular experience and expertise of the administrative agency are an integral part of forming the remedy, as is true under the civil penalties provisions.

(2) Discretion to Consider Non-Evidentiary Facts

The option of creating presumptions of evidence with respect to pre-detection violations of environmental requirements depends to a large extent upon the discretion of an agency to consider, in formulating its remedy, facts not presented in evidence but rather arising out of the knowledge and expertise of the administrative officers. In this manner it may be acceptable to presume that present violations have extended back to a prior date simply as a product of administrative experience and knowledge of the probabilities of such an occurance developed from years of experience.

The best formulation of this approach is expounded in Chicago, Burlington and Quincy Railroad Co. v. Babcock, 204 U.S. 585 (1907), where the railroad attacked the property assessments made by the state assessing board and sought to enjoin taxes based thereon. One claim was that the board members used information not properly presented before the tribunal. The Supreme Court held that the board members could use their own judgment and knowledge, stating that, "they express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge." (204 U.S. at 598).

In N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953), the Court reiterated this point when it was asserted that a chosen remedy was unsupported by the evidence presented within the instant case: "... in devising a remedy the Board is not confined to the record of a particular proceeding. 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated." (344 U.S. at 349).

In People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280 (1927), Chief Judge Cardozo overruled an order by a zoning board allowing a variance, but in doing so emphasized that the reason was not that the Board had considered unproffered evidence. In fact, he stated that the members could reach a decision based on their own knowledge without any witnesses at all. The reversal was necessary, however, because in the event that personal knowledge is used, the Board must set forth the facts known to its members but not otherwise disclosed.

The relevant Connecticut cases are all zoning cases as well. In each of a number of cases, the Connecticut Supreme Court has held that the zoning board may act upon facts not produced at the hearing that were products of their own knowledge or observation. Parsons v. Board of Zoning Appeals, 140 Conn 290 (1953); Blakeman v. Planning Commission, 152 Conn. 303 (1965); Forest Construction Co. v. Planning and Zoning Commission, 155 Conn. 669 (1967); Welch v. Zoning Board of Appeals, 158 Conn. 208 (1969). The Parsons cases added a requirement that "the conduct of the hearing shall not violate the fundamentals of natural justice." See also Woodbury v. Zoning Board of Review, 82 A. 2d 164 (R.I. S. Ct. 1951), a Rhode Island case where the Court emphasized that the agency is presumed to have "special knowledge" of those matters which are part and parcel of their administrative duties.

Professor Davis, in his administrative law treatise, makes a distinction between "legislative facts" and "adjudicative facts" which has gained widespread acceptance. Davis, Administrative Law Treatise, Section 15.03. Legislative facts are those which enter into the development of law and policy, which do not concern solely the immediate parties, and which help the tribunal to exercise its judgment or discretion in determining what course of action to take. Adjudicative facts, on the other hand, are those concerning the immediate parties; ones which would go to the jury in a judicial case. Davis concludes that "findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence." (Section 15.03 at p. 353).

The tone of the Davis piece places some obstacles in the way of ad hoc presumptions or assumptions relating to the determination of remedies in particular cases. These facts certainly "concern the immediate parties," in fact, they determine the activities in which those parties have engaged. In addition remedial facts normally go to the jury in civil cases. Davis, then, would appear to favor allowing presumptions only with respect to general policy choices which clearly affect several parties. The cases cited, however, convey a somewhat different impression. One major case is United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945), [Alcoa], where Judge Learned Hand refused to look at an outside report to determine aluminum production for the purposes of findings of facts because the appellate court could do no more than "notice" the report as newly discovered evidence and remand the issue to the trial court. But for the purposes of determining an appropriate remedy, he would take notice and rely upon the findings of the report. This dichotomy between fact-finding and remedial determination is supported by Gibson v. Connecticut Medical Examining Board, 141 Conn. 218 (1954), discussed more fully, supra, where the Court likened the choice of penalty by the agency to the imposition of a criminal sentence. Note that in Williams v. New York, 337 U.S. 241 (1949), the Supreme Court held that a judge in sentencing a convicted defendant is not limited to the use of information received in open court. Davis reacts to the Williams case by saying: "If this is the guide for use of extra-record information when a life is at stake, what is the guide when a sum of money or a license or a cease and desist order is at stake?" Davis goes on to contend, however, that the touchstone is not the remedial versus fact-finding distinction, but rather the dichotomy between the use of general knowledge and particular facts.

A final series of cases reinforces the sense that the law in this area is unclear, and that an agency proceeds at some risk when choosing to apply presumptions or assumptions based upon its own expertise. In Summer & Co. v. Erie Railroad Co., 255 I.C.C. 475 (1943), the plaintiff brought proceedings before the Commission for a reasonable rate order and reparations for past excessive charges. The Commission had previously, in other adjudications, set forth a presumption that rates greater than 70% of the basic scale of rates on iron and steel products were unreasonable per se. Plaintiff relied upon this series of decisions and presented no evidence of unreasonableness other than an excess over the 70% figure. The railroad did offer proof of reasonableness. Nevertheless, Division 3 of the I.C.C. held that the presumption should control. A federal district court reversed this decision, stating that a determination must be grounded upon evidence given during the required hearing. The full Commission then reasserted the supremacy of the presumption, 262 I.C.C. 43 (1945), on the basis that it was "impracticable and unnecessary to undertake a widespread and expensive investigation in each and every case." The federal district court upheld the order on the basis of the evidence presented, but objected to the reasoning of the Commission with respect to the presumption. Davis concludes that the use of the 70% figure in prior cases could be used as a substitute for evidence in later cases, and he cites various hard and fast rules, such as the irrebuttable presumption in many jurisdictions that children below the age of seven are not capable of the state of mind necessary to find them liable for intentional torts, which were developed in this manner. The difficulty is that for our purposes, one could not point to a long line of traditional decisions relying on a presumption of past violation before the date of detection. But the I.C.C. cases are more helpful, and one should note that the 70% rule is still in effect. Continental Foundry & Machine Co. v. Baltimore & Ohio Railroad Co., 296 I.C.C. 411, 421 (1955); Summer & Co v. Chesapeake & Ohio Railroad Co., 299 I.C.C. 625 (1956). And the hesitance displayed by the district courts in the Summer cases may be explained in terms of the apparent irrebuttable quality of the presumption. Thus, a clearly rebuttable presumption may be an acceptable administrative policy.

Finally, some difficulties with respect to the official notice of facts not presented at a hearing may be caused by the provision of the Connecticut Administrative Procedure Act, 4 C.G.S.A. Section 166 et seq. The Act considers the question of official notice in Section 4-178(4):

> "... notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, ... and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence."

The scope of the power to officially notice facts is unclear as stated above, and no cases could be found addressing the issue. Notice is limited to "generally recognized technical or scientific facts," and it is unclear the degree to which facts noticed must be "technical" or "scientific." It is at least arguable that any factual assumptions made by a hearing examiner that relate to the likelihood of violations prior to detection would be supportable if they involve some knowledge of the steps which are generally taken to comply with the relevant restrictions. In addition, the Act's provision for the use of "experience" and "specialized knowledge" with respect to the evaluation of the evidence is somewhat broader than the provision for official notice. Thus, it should be the case that a more expansive use of facts and general knowledge outside of the evidence presented at the hearing would be possible when the tribunal sets a penalty, which involves evaluation rather than fact-finding, than when the tribunal actually determines whether a present violation has occurred.

In any case, it should be recognized that the A.P.A. clearly sets forth a policy of advance notice of the facts to be independently recognized by the tribunal. Note, however, that this clause in the Act may relate only to official notice in the process of fact-finding, and not in the process of evaluating the facts. In terms of statutory construction this interpretation makes sense because the notice requirement follows the provisions for official notice in fact-finding, and appears to serve as a limiting principle, but precedes the clause concerning the evaluation of facts. In addition, this interpretation is reasonable since the factors entering into the evaluation of evidence are more likely to be impressions gathered from experience which are not capable of clear elucidation. The caveat remains, however, that a court will strictly construe any failure to give notice because of both the clear intent of the A.P.A. to provide notice, and notions of fundamental fairness.

Altogether, the option of creating presumptions or assumptions of fact concerning activities prior to the date of detection is not precluded, but may be risky. There is precedent for the use of such presumptions in both adjudicative decisions (see the Summer cases, supra) and administrative regulations. The precedent that could be found for the latter proposition is the E.P.A. guidelines for the assessment of civil penalties under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136-1(a)], as stated in 39 Fed. Reg. 27711 (July, 31, 1974). There the Agency creates a presumption by regulation that the assessment of a civil penalty will not affect the ability of a firm to continue business, this factor being a consideration required to be made by the Administrator prior to setting a penalty under the statute. The regulation has not, however, been judicially tested. It is likely that similar types of regulations could be found through an exhaustive search of the regulations promulgated by various federal agencies.

If the presumption option is chosen, clear provisions for advance notice should be made, and a definite dichotomy sould be emphasized between a presumption for the purposes of determining the appropriate penalty, and one which relates to the actual finding of a violation.

III. The Choice Between Setting Policies by Regulation and by Ad Hoc Adjudicative Decisions

The law in this area is fairly clear, at least in the federal sector. Relevant Connecticut precedent, on the other hand, is simply unavailable. The major case is S.E.C. v. Chenery Corp., 332 U.S. 194 (1947), where the Supreme Court stated a preference for the use of regulations as a matter of policy but clearly held that it was a discretionary choice left to the agency:

> "Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct....The function of filling in the interstices of the [statute] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise....In performing its important functions... an administrative agency must be equipped to act either by general rule or by individual order.
>
> "[The] agency may not have had sufficient experience with a problem to warrant rigidity in its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In these situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective....And the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informal discretion of the administrative agency." (322 U.S. at 202-203).

In N.L.R.B. v. A.P.W. Products Co., 316 F. 2d 899 (2d Cir. 1963), the Board altered a 26 year policy concerning how to compute the employer's back pay liability to a reinstated employee. The Court of Appeals enforced the order nonetheless, even though the Board failed to give notice of the proposed change prior to or during the adjudication. The Court held that the Board could have proceeded in rule-making fashion, but the question before it was "not one of wisdom but of authority," and the adjudicative process of agencies, like that of courts, "gives birth to 'rules' which may apply for the past, future, or both." The choice of method is "a question of judgment, not power."

Similarly, in Connecticut Limousine Service, Inc. v. United States, 281 F. Supp. 681 (D. Conn. 1968), the Court upheld an I.C.C. order denying the application of the limousine service for removal of a restriction limiting the number of passengers in any vehicle. Plaintiff had argued that the Commission was required to proceed under its rule-making powers because the grounds of the denial were that the removal might create a new type of service. This was asserted to be the type of determination that was a "rule" under the definition of the federal Administrative Procedure Act, 5 U.S.C. Section 551 et seq. The Act defined a rule as "the whole or a part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy..." The Court held that this provision did not preclude adjudicative policy-making, and that "the choice between proceeding by rule and by ad hoc litigation lies primarily in the informal discretion of the administrative agency."

The only case implying some control over this freedom of choice is N.L.R.B. v. Majestic Weaving Co., Inc., 355 F. 2d 854 (2d Cir. 1966). There the Board changed a 15 year policy of allowing conditional agreements between an employer and an unrecognized union effective upon the attainment of majority support by that union in the bargaining unit as being short of an unfair labor practice for unlawful assistance to an organizing union. The Court stated that it had no difficulty finding the substance of the altered policy to be within the discretion of the Board. But an adjudicative formulation of a new rule branding as unfair, conduct stamped fair at the time the party acted raises "judicial hackles" more disturbing than those where there is an imposition of a more severe remedy for conduct already prohibited. "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency," but a case of second impression changing the scope of what is considered to be illegal is one where it is particulary important to take full advantage of the power to act prospectively, whether by rule-making or adjudication.

The cases discussed above indicate fairly clearly that the choice of a vehicle for determining remedial policy, as between ad hoc adjudications and officially promulgated regulations, is a free one. The only case questioning the discretion of an agency in making this choice distinguished the alteration of a remedial policy from that of a substantive policy delineating prohibited conduct. The degree of discretion that the administrative policy-makers for the civil penalties program should have in choosing the means of effectuating remedial policy should be even greater, since there is no fairness question with respect to the alteration of previously developed expectations concerning the size of civil penalties for pollution violations. This fact notwithstanding, the Department would be wise to clarify in advance of the penalty determination the fact that the period of past delay will be a major factor.

One element may serve to restrict the discretion of the Department in choosing between regulations and adjudicative decisions, and that is the legislative history of the enabling act. In both houses of the legislature there were expressions of hesitance on the part of those opposing the bill to grant the Commissioner the broad power to invoke civil penalties up to $25,000. In the Senate, Senator Costello responded to this apprehensiveness by emphasizing that the Commissioner must "establish through regulation the guidelines and criteria and a schedule of fines that may be imposed, and this must go through the entire regulation process which all state agencies go through..." (Senate debate, May 15, 1973). In the House of Representatives, Representative Avcollie responded in like manner: "...the Commissioner can't do nothing [sic] under the laws that we've passed without public hearings. Further,...these penalties will not... become effective until the Regulations Review Board...approves them." (House debate, May 23, 1973).

Although these statements are surely not conclusive, and the latter one appears to be directed towards the adoption of a penalty schedule more than anything else, a court could easily find the tone of the legislature to be one of strict control over the potential discretion of the Commissioner, thus reducing administrative discretion in general. In particular, both men appeared to rely upon the importance of the rigorous procedures required before a regulation becomes effective in convincing their colleagues that the Commissioner's discretion was, in fact, circumscribed. As a result, the choice of the adjudicative policy route with respect to this particular statute is more risky than the general legal discussion above would indicate. In making this policy choice, the Commissioner should be aware of the fact that an avoidance of the rigid rule-making process creates some incalculably greater probability that a particular policy will be overturned by the courts.

ASSESSMENTS DURING LITIGATIVE DELAY (I)

This memo concludes that assessments which accrue during litigation are legally justifiable for the following reasons:

(1) No regulatee is forced to violate the law in order to test the validity of the civil assessment statute and regulations.

(2) Since the assessment merely equalize the benefits of delay, no regulatee is harmed financially for pursuing the legal process.

(3) Assessments during the period of litigative delay protect the rights of innocent competitors.

(4) Regulatees are protected from any possible injustice by court discretion to stay the accumulation of assessments.

There are two basic approaches available to the Department for assessment accumulation:

(1) Estimate the time required for litigative proceedings and include this period in the calculation of the initial lump-sum amount. This amount would be subject to a $25,000 maximum.

(2) Use the $1,000 per day assessment for continued violation after final agency disposition. This approach does not reach the benefits of delay during agency hearings.

A mixture of the two approaches seems best. The Department could, for instance, use the lump-sum method to cover delay during hearings, and the daily assessment method to cover delay during court appeals.

If the daily assessment approach is adopted, the hearing officer or the Commissioner could supplement the record with a report judging the sincerity of the regulatee in pursuing his appeal and calculating the economic benefit that will accrue to him during the course of the litigation.

PENALTIES FOR LITIGATIVE DELAY

Program Objectives

The D.E.P. wishes to tax away the cost-saving benefit to a source who fails to make an investment in pollution control. Those benefits begin to accrue at the point that investment should have started and continue accumulating until compliance with environmental standards has finally been achieved. It follows that benefits accrue during the pendency of litigation and provide economic incentive to litigate even where failure in agency and judicial proceedings is expected. Thus, in addition to insuring that non-compliance is unprofitable and repairing the financial harm done to law-abiding economic competitors, a third goal of D.E.P.'s penalty program is to deter meritless litigation.

Penalty Options for Litigative Delay

Penalties which increase in size as a function of litigative delay may be calculated in two ways under the Enforcement Act. Both options use the following formula to calculate the amount of the penalty:

(Period of Delay)(Cost of Capital)(Cost of Compliance) = Civil Penalty.

The amount of the penalty assessed under both options is, therefore, the same. However, the options differ in the procedures by which the penalty is assessed. As is often the case, procedural differences influence the legal issues which must be considered.

Option One: The first option is to estimate the time required for litigative proceedings (both administrative hearing and court appeals). The formula may then be used to calculate a lump-sum amount to be included as part of the penalty for initial violation of the law. Thus, the penalty for litigative delay would be joined with the penalty for past delay and together would be subject to a $25,000 maximum.

The $25,000 limit for both penalties is, of course, a severe disadvantage for this option. In those cases where the cost of compliance is high, benefits of delay will be correspondingly great and the $25,000 limit will be reached after a short period of time. This means that much of the cost savings during litigation will not be taxed via option one. Unfortunately, cases where the cost of compliance are great tend to be the cases involving the greatest environmental damage and where rapid abatement is the most desirable.

In order to insure that the estimates of delay are not longer than the actual period of litigation delay, provision can be made for correction of the penalty assessment period when litigation is completed, and consequently, for lowering of the penalty (under the authority of Section 2(e) of the Act). For example, a regulatee who does not choose to take a court appeal will have the entire estimate period for judicial review removed from the calculation.

This will lead to a substantial decrease in the amount of his penalty. It should be noted, however, that another disadvantage of option one is that Section 2(d) of the Act prohibits raising the penalty. Thus, when the department's estimate understates the actual length of delay, the regulatee benefits and thus has every incentive to delay.

Option Two: The second possible method of penalizing litigative delay is to use the daily penalties of up to $1,000 per day for continued violation after final agency disposition of the case. The "Cost of Compliance" formula could be used to determine the daily penalty. There are two readily apparent problems with the option. First, it does not reach the benefits of delay during agency hearings. Second, the burden of proving violation on a daily basis imposes great administrative costs. The advantages of the option are also obvious. The $25,000 limit on the penalty for initial violation is no longer a problem. Penalties for appelate delay can go as high as the benefits to the regulatee. Moreover, benefits from litigative delay which lasts longer than in the usual case will be taxed.

Mixed Options: There is no inconsistency in D.E.P.'s use of both methods of assessing the penalty for litigative delay—provided no period is counted twice. A natural arrangement would be to use the lump-sum method in option one to cover delay during the hearings, and to use the daily penalty method in option two to cover the benefits from court appeals. Other mixes are possible. The "best" mix will depend on both practical factors and legal considerations which are discussed below.

Legal Considerations

The legal issues surrounding D.E.P.'s proposed penalties for litigative delay will undoubtedly be challenged on the basis of constitutionality and statutory authority. No other penalties for litigative delay as comprehensive as those proposed by D.E.P. have been discovered in Connecticut, federal or other jurisdictions. Reasoning, then, must be by analogy to similar problems.

The Ruling of *Ex Parte Young*

Statement of the Problem.

Any penalty that is unreasonably large—regardless of its method of calculation—violates due process of law. One test of the unreasonableness of a penalty is related to its burdening of access to the courts. This rule was first announced in the *Ex Parte Young* 209 U.S. 123 (1907). In the *Young* case, railroads operating in Minnesota were told to establish their shipping fees at a rate fixed by statute or by the state railroad commission. Violators (including corporations, officers, and employees) of commission orders were subject to civil penalties of $2,500 to $5,000 for a first offense and up to $10,000 for subsequent violations. Violators of statutory rates faced criminal fines of up to $5,000, imprisonment for up to 5 years, or both. The only method open to the railroads to test the validity of the statute or commission order (i.e. to determine whether or not they were "confiscatory") was to violate the law or order and await prosecution.

The Supreme Court held that Minnesota's statutes were an unconstitutional violation of equal protection of the law because of their severe penalties.

> "If it turns out that the rates are too low /to provide a return upon investments/ then they are illegal. Now to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

The Young case thus establishes in certain cases a balancing test between the right of the government to compel obedience and the right of regulatees to judicial review of the validity of statutes and orders. The Young rule prohibits the state from turning the opportunity for judicial review into a gamble that is not worth taking. "The right to a judicial review must be substantial, adequate and safely available." Wadley So. Ry. v. Georgia, 235 U.S. 651, 661 (1914).

Methods of Bypassing the Young Rule.

The Ex Parte Young rule applies when unreasonable penalties bar the sole access to the courts. By implication, there are three ways of avoiding the problem. The first method is to provide alternative access to the court which does not entail the risk of a high penalty. The second method is to prescribe penalties which are high enough to insure compliance while not high enough to create a bar to court review. The third method is to establish the claim that penalties are actually compensation for damage done to innocent parties.

1. Alternative access to the courts.

The court in both the Young and Wadley cases cited with approval the following dicta in Cotting v. Kansas City Stockyards, 183 U.S. 79, 102;

> "It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."

Thus, once an order has been found to be valid, penalties high enough to insure obedience may be imposed because access to the courts is no longer a consideration.

The corollary to the rule stated in Cotting is that where a party has had an unpenalized opportunity to challenge an order, but fails to do so, then the agency (and the courts) may assume tacit acceptance of the validity of the order. High penalties are therefore lawful. This is the holding of the Wadley case:

> "/O/n principle, and on the authority of all that has been said on the subject, there is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; not to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do."
>
> Wadley p. 667

A regulatee who violates the law is generally entitled to challenge the validity of an order as a defense even if other procedures are available for testing it. See, e.g., United States v. McCrillis, 200 F. 2d 884 (1st Cir. 1952). However, the Wadley holding means that violation of an order can be sternly punished if alternate access to the courts is unburdened. The right to "substantial, adequate, and safely available" judicial review must be guaranteed by at least one route to the courts--but need not be insured by all possible routes.

An example of the kind of procedures which meet the test of providing safe alternative access to the courts will help clarify the issue.

In Rail Coal Co. v. Ohio Industrial Commission, 236 U.S. 338 (1914) the Supreme Court found reasonable and outside the prohibition of Ex Parte Young a substantial penalty for violation of a state industrial commission's orders under a screening law which determined the rates paid to coal miners. The Court found the penalty violated no constitutional rights of employers because of procedural protections nearly identical to the statutory provisions for administrative hearing and appeal at D.E.P. (236 U.S. at 348,49).

> "The orders of the Commission are not final, but are subject to review under the statute of Ohio found in 103 Ohio Laws at Page 95, where orders of the Commission are declared to be only prima facie reasonable, and any employer or other person in interest, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio to vacate or amend any such order upon the ground that the same is unreasonable or unlawful and the Supreme Court is authorized to hear and determine such action and may, in its discretion (Section 41), suspend all or any part of the order of the Commission. The statute makes provision for the prompt hearing of all such actions, in preference to other civil cases, with some exceptions. It would seem that this system of law, with a right to review in the manner we have stated in the Supreme Court of Ohio, has provided a system ample for the protection of the rights of employers."

It ought to be clear then that civil penalties for violation of an order to abate as prescribed in Section 2(a)(3) fall outside the rule of Ex Parte Young. A regulatee who violates the terms of an abatement order may have a defense for his non-compliance including the invalidity of the order. However, civil penalties high enough to ensure compliance will not be held to be unreasonable on account of their burdening of access to the court. D.E.P. procedures provide ample opportunity for unfettered access to the courts.

It is important to note, however, that alternative access to the court is provided for all matters that might come up in a civil penalties hearing by use of administrative and judicial declaratory judgment procedures. The existence of declaratory judgment route as negating the Ex Parte Young rule was suggested by the Supreme Court in St. Regis Paper Co. v. United States, 368 U.S. 208 (1961). Thus, the existence of safe alternative routes for testing the validity of orders and for determining liability prior to violation ought to prevent the Young rule from being a problem for D.E.P.'s civil penalties. It would be wise, however, to remind regulatees in the Civil Penalties regulations of the availability of the declaratory judgment procedures.

The Reasonableness of Penalties Under Ex Parte Young

A penalty that is unreasonable under the Young rule may be reasonable for violation of orders whose validity has been established. Thus, the standard of reasonableness under the Young rule is more severe than the standard of reasonableness for penalties in general. Unfortunately, no definition of reasonableness has been spelled out for application for the Young rule.

There are at least four plausible benchmarks with which to compare a penalty for the purpose of determining its reasonableness.

1) The amount required to insure compliance. See e.g. Walsh, 42 A. 2d 362 (S. Ct. Conn. 1945).
2) The amount of damage caused by non-compliance. See e.g. Missouri Pacific RY. Co. v. Tucker, 230 U.S. 34 (1912).
3) The amount of benefit anticipated by the regulatee at the time of violation. (e.g. prior to detections and prosecution).
4) The amount of actual benefit from non-compliance.

No general functional relationship exists between these alternative standards. The issue with regard to the Ex Parte Young problem is to determine which of the four methods of penalty setting will yield a penalty that does not deter a court challenge of the validity of an order.

The essence of the Young rule is that if failure in the courts leads to a large loss then court challenges will not be taken. If failure in the court leads to no loss, or a small one, then the penalty is reasonable. Based on these considerations, it is clear that a penalty calculated by option four (merely taking away the actual benefit of non-compliance), provides a reasonable penalty under the Young rule. The party who wins pays no penalty at all. The party who loses is in no worse position than if he complied with the law or order in the first place. Hence, there is nothing to lose by violating a law or order to test its validity.

It should be obvious that D.E.P.'s proposed penalty based on actual benefit with a small and limited increment for costs imposed on the state is reasonable under the Young rule. Moreover, the reasonableness pertains even if the state's declaratory judgment procedures (providing another riskless route to the courts) were not available.

3. Penalties As Damages

Styling civil penalties as damages is a third way around the Young rule. Penalties based on actual benefit from non-compliance will sometimes be higher than penalties which are based on damages but often will be lower. There do not appear to be any cases asserting that potential liability for severe damages creates an unconstitutional burden on access to the courts. This result must rest on the fact that another interest, namely the right of innocent parties to be compensated for harm done to them, is of greater weight than the right of a party to challenge the validity of a law or order. It is easy to see that in some of the cases where liability for damages obtains only upon violation of a statute or order whose validity is uncertain regulatees will be forced to comply with a law or order to avoid risking payment of ruinous damage awards. Thus, to the extent that penalties are styled as damages they may also escape the Young rule.

Burdening on Administrative Hearing and the Appeal of Final Orders with the Lump Sum Penalty.

The corollary to the holding that there is no right to an appeal from an administrative decision is that the state may impose conditions on appeals of those decisions in the same manner that it may burden appeals of judicial decisions. Thus, just as the courts may impose interest on judgments where there has been an unsuccessful appeal, court fees, and the filing of supersedeas bonds, the state may also burden an appeal of an administrative decision provided the burden is not unreasonable. The lump-sum penalty proposed will penalize delay in compliance with administrative orders only to the extent of the economic benefit provided by the delay. This principle has been upheld in litigation over patent rights, MacDonald v. Winfield, 104 F. Supp. 609 (1952), options to purchase real estate back pay owed to employees dismissed in violation of the National Labor Relations Act APW Products v. NLRB, 137 NLRB 25, and in assessing interest on damage awards. The lump sum penalty calculated on the basis of the economic benefit from violating the law finds its analog in court suits for damages because it is a penalty in the nature of damages and must be distinguished from penalties in general which are arbitrary in amount and which have the purpose of punishing the offender, rather than of returning him and those he has injured to the status quo before the violation occurred.

The general test determining whether a penalty is consistent with the demands of due process is the same as that stated in the Young rule. It requires that there be a balancing of the state's interest in compelling compliance with the law and the violator's right to appeal the validity of administrative orders. The violator's right to test the validity of environmental standards and state enforcement laws prior to hearing is protected by his right to bring a declaratory judgment, C.G.S.A. Section 4-175, 176, before he chooses to violate the law.

The availability of an alternative route into the courts protects the violator sufficiently so that even if the burden which the lump-sum penalty imposes on the violator who chooses to have a hearing actually penalizes litigation (which it does not), due process requirements are satisfied.

Any limitation on due process which may appear to result from the imposition of a daily penalty, whether such penalty is included in a lump-sum penalty or imposed subsequently as a daily penalty must be balanced by the effect the penalty has in enforcing economic equality among competing corporations. By penalizing corporations for the amount of economic benefit which they derive from unsuccessful litigation, these litigants are denied an economic advantage which they would otherwise have over corporations who have already complied with the law.

A lump-sum penalty which incorporates a daily fine will prevent the Enforcement Act from being undermined by declaratory litigation. The Connecticut APA provides that a court may grant a stay of an administrative order while the appeal is pending C.G.S.A. Section 4-166 et seq. St. Regis Paper Co. v. U.S., 368 U.S. 208 (1961) and Genuine Parts Co. v. F.T.C., 445 F. 2d 1382 (1971), can be read to imply that a stay will always be granted where the appelant complies with procedural requirements and there is no evidence of bad faith. A lump-sum penalty which includes a daily fine and which provides for mitigation by the commissioner where no appeal has been taken will circumvent the possible tolling of the cumulative penalty by the courts. It will provide protection for violators who comply without litigating (explained earlier) and it is subject to correction.

Burdening the Appeal of a Final Order with a Cumulative Daily Fine

The case law reveals little support for the imposition of a daily fine (cumulative penalty). Judicial objections to such fines are grounded in the not unreasonable suspicion that such accumulated penalties could impose ruinous burdens on violators if the law which will preclude their seeking legal remedies against unjust laws and administrative orders. As a result the courts have generally tolled the accumulation of daily fines so long as an appeal was not considered frivolous or dilatory or grounded in some other form of bad faith (see discussion of the superiority of a lump-sum penalty). The effect of this practice has been to highlight the negative aspect of daily penalties and to fail to articulate any standards for reasonable penalties which might be permitted to accumulate daily. The bases upholding such penalties fall into no consistent pattern although there appears to be increasing recognition of the need to penalize dilatory litigation. See State ex rel Railroad Commission v. Oregon R. & Nav. Co., 68 Wash. 160, 123 Pac. 3 (1912); St. Louis Iron Mountain and St. Paul Rwy. Co. v. Paul, 173 U.S. 404 (1898); Portland R. Light & Power Co. v. Portland, 210 F. 667 (1914); Florsheim v. Weinburger, 346 F. Supp. 950 (1972) and St. Regis, supra.

Where effective enforcement of environmental standards requires the imposition of a daily penalty, the justification must be that of reasonableness and necessity to effectuate the purposes of the act.

CONCLUSION

From the above analysis it would appear that penalties for litigative delay--though not without legal risk--ought to be possible. The major reasons for concluding this are as follows:

1. No regulatee is forced to violate the law subject to Civil Penalties in order to obtain agency and judicial decisions regarding the constitutionality and validity of statutes and orders and his liability under them.

2. D.E.P.'s penalties for litigative delay are not only reasonable but in fact merely tax the benefits of delay. No one is put into a worse financial condition for pursuing the legal process.

3. D.E.P.'s penalties are in fact a measure of the damage to economic competitors, thus the rights of innocent third parties not to be injured by unlawful conduct is also an issue.

4. If the daily penalty option is chosen as the method of imposing the penalties for litigative delay, then the regulatee is protected by court discretion to stay accumulation where injustice might still be done--despite the safeguards built into D.E.P.'s program. Thus, the regulatee subject to daily penalties makes up in court protection what he loses in notice of the limit of potential liability under the lump-sum option.

It was stated in the introduction that some mix of the two penalty approaches available to D.E.P. might be the "best" approach. On the basis of legal considerations the best mix would seem to be use of option one (the lump-sum penalty) to its full extent with option two (daily penalties) reserved for cases where:

a) he penalty for both past and litigative delay exceeded the $25,000 limit on the penalty for initial violation, or

b) he length of litigative delay exceeds the amount estimated by the Commissioner at the time of issuance of the notice of violation.

Primary reliance on the lump sum option is desirable because it is less costly administratively, it provides the regulatee with information regarding the probable extent of his liability at an early date, and is not subject to judicial stay. However, availability of the daily penalties where benefits of delay are great will be useful. Abuse by the agency is always open to judicial stay of accumulation.

If the daily penalty option is used, it would be useful in every case to prepare a report for the judge giving two basic sorts of information:

1. (i) The Department's estimate of sincerity in pursuing litigation, and (ii) the economic benefit that accrues during litigation and the economic and environmental damage that continues. This certification procedure would provide a judge who is inclined to stay penalties with information he needs to determine the good faith of the legal challenge (this is especially important since such decisions are likely to be made on a "short calendar day" with little chance for argument).
2. The procedure would point out that because the penalties are geared toward benefit, they should run even in the case of good faith appeal.

ASSESSMENTS DURING LITIGATIVE DELAY (II)

Accrual of civil assessments during administrative hearings is clearly within the authority granted by the Enforcement Act under 2(c)(1) (immediate and continued compliance),2(c)(5) (economic and financial condition of violator),and 2(c)(7) (injury to third parties). In addition, cumulative daily assessments are specifically permitted under 2(a)(2) and (3). However, under 4-183(c) of the Connecticut APA, a stay of assessment accrual is within the discretion of the courts.

Constitutionality of accumulation will only be an issue if the potential assessment is so severe that it bars the litigant from access to the courts. Since alternate access is available (through the declaratory judgment process) and since the assessments are geared solely to the benefits of delay and hence are neither "ruinous" nor "unreasonable," there should be no constitutional objection.

Connecticut has not addressed the question of accrual directly, but in response to the general question of assessment reasonableness, in a case where a fine greatly exceeded illegal benefit, the Connecticut court sustained the ruling that the public interest in a uniform assessment scheme was the paramount factor.

II. D. Accrual of Civil Penalties During Administrative Proceedings and Judicial Review

TO: CPEP Staff

FROM: Glen Gross DATE: November 4, 1974

I. Introduction

A. Program Objectives.

Section 2(b) of P.A. 73-665 directs the Commissioner, in adopting schedules of civil penalties for violations, to consider four factors:

(1) immediate and continued compliance;

(2) the character and degree of injury to, or interference with

(a) public health, safety and welfare;

(b) the public trust in the air, water land and other natural resources of the state; and

(c) reasonable use of property which is caused or likely to be caused by the violation.

The legislative history of the Act amplifies these standards, and suggests a legislative intent to eliminate the benefits from delayed compliance and to equalize the financial position of violators with that of those who comply with applicable standards. (See discussion of legislative history, intra, p. 4)

In designing a program to implement this section, the Commissioner has determined that the most effective approach to achieving these goals is, in effect, to tax away through civil penalties the cost savings a violator realizes from delaying compliance with applicable standards. This approach ensures civil penalties (1) large enough to encourage immediate and continued compliance and to safeguard the state's natural resources, (2) large enough to compensate for the economic harm done to competitors who comply with the law, and (3) no larger than necessary to achieve compliance, thereby protecting violators from excessive charges.

The benefits of delayed compliance begin to accrue at the point when an investment in pollution control should have been made, and continue accumulating until compliance with environmental standards has finally been achieved. It follows that benefits accrue during the pendency of litigation. Thus, in order to provide that non-compliance is unprofitable and to repair the financial harm done to law abiding economic competitors of violators, civil penalties should continue to accrue during periods of administrative proceeding and judicial review, absent mitigating circumstances.

B. Program Operation.

The "assessment period" defined in Section 22a-6b-602(b)(1) ends at the point that the Commissioner issues a final order to abate. Thus, the assessment period includes delay in compliance due to an agency hearing. The benefits of delay which accrue to a violator during hearing are therefore assessed away in the initial lump-sum penalty for violation of an air emissions standard. Extraordinary delays in compliance beyond the control of the regulatee during the hearing stage will not be penalized.

It is explicitly stated in Section 602(g)(3) that delays attributable to the Department in excess of routine processing time will not be taxed.

The "assessment period" defined in Section 22a-6b-603(b)(1) covers the period of time that a regulatee fails to comply with a final order of the Commissioner. This period includes the delay created by a violator who fails to comply with an order while seeking judicial review. Extraordinary delays during this period beyond the control of the violator will not be penalized. The benefits of delay during appeal will generally be assessed as a lump-sum penalty subject to a $25,000 maximum. However, the Department has retained the option offered in the Enforcement Act of using the daily fine provisions in addition to the lump-sum penalty in those cases where the benefits of delay are great and the course of judicial process is lengthy.

C. Basic Legal Issues.

Three legal issues are raised by DEP's proposed accrual of penalties during administrative proceeding and judicial review:

(1) Is the scheme authorized by the Enforcement Act?

(2) Does the proposed scheme conflict with the Connecticut Administrative Procedures Act?

(3) Are the violator's constitutional rights to due process violated by taking away the pecuniary benefits he receives from non-compliance during a hearing and court appeals?

II. Statutory Authority

The accural of civil penalties during administrative proceedings and judicial review seems clearly within the authority granted the Commissioner by the Enforcement Act. Section 2(b) of the Act makes "immediate and continued compliance" the primary criterion in establishing the civil penalty schedule. Section 2(c)(1) makes the "immediate and continued compliance" the first factor to be looked at in setting penalties in each individual case. Moreover, Section 2(c)(5) tells the Commissioner to examine the economic and financial conditions of a violator. Finally Section 2(c)(7) directs the Commissioner to look at the injury done to third parties. Accrual of civil penalties during litigation is justified under all of these sections of the Act since the benefits of non-compliance continue to accrue during this period. Of course, the cumulative daily penalties are specifically authorized by Sections 2(a)(2) and (3).

This authority is further supported by the legislative history of the Act. Senator Costello, in explaining the bill on the Senate floor, stated:

> "[with this bill] we allow [the Commissioner] to put the dollar sign in front of the violator at the very outset of the whole penalty process. And then the violator must think about those daily fines totaling up and we hope that by this process we will be able to get to the root of the most important aspect of environmental legislation which is the enforcement of the protection of our environment. ...[This process] is one that the Federal Government has used very effectively, particularly in the field of income tax enforcement." Proceedings of the Senate, Connecticut General Assembly, January Session 1973, at 3543 (May 15, 1973).

Similarly, Representative Wagner explained the bill on the House floor by reciting one of the enforcement problems the bill addressed:

> "Presently the procedures existent and available to the Commissioner are unfair to most companies. What I mean by this, Mr. Speaker, is that basically it can be a company that may comply with an order to abate pollution by making a capital expenditure, where another company may not, save the capital expenditure and tie the matter up in the courts." Procedures of the House of Representatives, Connecticut General Assembly, January Session, 1973, at 7781 (May 23, 1973).

Representative Stevens, the Majority Leader, underscored this intent:

> "[N]o matter how expeditious the Attorney General wants to be, there is no question but that attorneys can tie him up in the Court for long periods of time, and, quite frankly, it's cheaper for many firms to continue to pollute, to pay attorneys' fees, write the attorneys' fees off, than it would be to comply with the Commissioner's order." id., at 7787.

The goals of eliminating the profits of pollution and compensating for the harm done to the competitors of violators both suggest authority to assess appropriate civil penalties during litigation, since both savings to violators and harm to competitors accrue during this period. Moreover, Senator Costello's reference to the internal revenue system underscores the suggestion, since interest accrues on tax claims during litigation. See United States v. Childs, 266 U.S. 304 (1924). Representatives Wagner's and Stevens' comments expressly indicate an intent to authorize accrual of civil penalties during litigation.

III. Accrual During Litigation and the APA

The Connecticut Administrative Procedure Act is silent on the treatment of civil penalties. Thus, it must be assumed that an order to pay a civil penalty will be treated in the same manner as other agency orders. The relevant portion of the APA is Section 4-183(c) which states: "The filing of the petition [for appeal] does not of itself stay enforcement of the agency decision. The agency may grant or the reviewing court may order, a stay upon appropriate terms." Under this section, the question of whether a stay of the lump sum or cumulative penalties for judicial appeal should be granted is up to the discretion of the court but is not automatic. Thus, there is no conflict betweeen the APA and DEP's proposed penalties.

IV. The Constitutionality of Civil Penalty Accrual During Litigation

A. Federal Law.

1. Lump sum penalties and cumulative penalties assessed prior to litigation.

Any penalty that is unreasonably large -- regardless of its method of calculation -- violates due process of law. One test of the unreasonableness of a penalty is related to its burdening of access to the courts. This rule was first announced in Ex Parte Young, 209 U.S. 123 (1907). In the Young case, railroads operating in Minnesota were told to establish their shipping fees at a rate fixed by statute or by the state railroad commission. Violators (including corporations, officers, and employees) of commission orders were subject to civil penalties of

$2,500 to $5,000 for a first offense and up to $10,000 for subsequent violations. Violators of statutory rates faced criminal fines of up to $5,000, imprisonment for up to 5 years or both. The only method open to the railroads to test the validity of the statute or commission order (i.e. to determine whether or not they were "confiscatory") was to violate the law or order and await prosecution.

The Supreme Court held that Minnesota's statutes were an unconstitutional violation of equal protection of the law because of their severe penalties.

> "If it turns out that the rates are too low [to provide a return upon investments] then they are illegal. Now to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid." Young p. 148

The Young case thus establishes in certain cases a balancing test between the right of the government to compel obedience and the right of regulatees to judicial review of the validity of statutes and orders. The Young rule prohibits the state from turning the opportunity for judicial review into a gamble that is not worth taking. "The right to a judicial review must be substantial, adequate and safely available." Wadley So. Ry. v. Georgia 235 U.S. 651, 661 (1914).

In Wadley So. Ry. v. Georgia, 235 U.S. 651, the Supreme Court made it clear that the reasonableness of cumulative penalties assessed prior to litigation on the constitutionality of a statute or order (e.g. daily fines for repeated violation) should be judged on the same grounds as lump sum penalties. In the Wadley case, a railroad was ordered by the Georgia railroad commission to end discrimination in its customer policies. Instead of challenging the constitutionality of the commission's order in the courts directly, the railroad chose to violate the order. Georgia law permitted penalties of up to $5,000 for every day an order of the commission was violated. In a suit for penalties for non-compliance the commission asked for a single penalty not to exceed $5,000 despite the fact that the railroad had violated the order on diverse days. In approaching the case the court stated:

> "[A] statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the court to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself. In considering that question in the present case, the constitutionality of the act involved, is not to be decided... by the fact that the State only asked a penalty for one day's disobedience instead of many." p. 666

The Young rule applies when unreasonable penalties bar the sole access to the courts to determine the constitutionality of a law or administrative orders. There are two readily apparent ways of avoiding the problem. The first method is to provide at least one alternative means of access to the court to challenge the constitutionality of a law or order which does not entail the risk of a high penalty. The second method is to prescribe penalties which while great enough to insure compliance are not so high that they create an unreasonable bar to court review.

a. Alternative access to the courts.

The court in both the Young and Wadley cases cited with approval the following dicta in Cotting v. Kansas City Stockyards, 183 U.S. 79, 102:

> "It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."

Thus, once an order or statute has been found to be valid, penalties high enough to insure obedience may be imposed because access to the courts is no longer a consideration.

The corollary to the rule stated in Cotting is that where a party has had an unpenalized opportunity to challenge a statute or an order, but fails to do so, then the agency (and the courts) may assume tacit acceptance of the validity of the order. High penalties are therefore lawful. This is the holding of the Wadley case:

> "On principle, and on the authority of all that has been said on the subject, there is no room to

> doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do." Wadley p. 66/

In accord with the Wadley case is Gulf, Colorado & Santa Fe Ry. v. State of Texas, 246 U.S. 58 (1918). In the Gulf case the railroad chose to disobey the order of a state commission 224 times rather than seek a pre-violation judicial test of the order. Texas law permitted penalties of up to $5,000 for every violation. The commission sought enforcement of its order and the trial court assessed a penalty of $22,400. The railroad raised the validity of the order as a defense for its violation. The Supreme Court upheld the validity of the order and the imposition of the fine. Speaking for the court, Justice Holmes stated:

> The other point argued here is that the railroad could not be subjected to, at most, more than one penalty while the validity of the order was awaiting judicial determination, Ex Parte Young, 209 U.S. 123, 147, being relied upon. But the statutes of Texas provided for a suit to test the validity of the order, in a court either of the State or of the United States. [Citations omitted] The railroad company saw fit to await proceedings against it, and although the case in all its aspects is somewhat extreme the judgement must be affirmed. Wadley So. Ry. v. Georgia, 235 U.S. 651, 669. Gulf p. 62.

The Wadley and Gulf cases stand for the principle that violation of an order can be sternly punished if alternate access to the courts is unburdened. In other words, the right to "substantial, adequate, and safely available" judicial review of constitutionality must be guaranteed by at least one route to the courts -- but need not be insured by all possible routes.

The important issue raised by Wadley and Gulf is to determine what alternative procedures for access to the courts are sufficiently safe and available so that access by violation may be penalized. One example of a procedure meeting the tests of providing safe alternative access to the courts is given in Rail Coal Co. v. Ohio Industrial Commission, 236 U.S. 338 (1914), where the Supreme Court found reasonable and outside of the prohibition of Ex Parte Young a penalty of up to $600 for violation of a state commission's orders under a screening law which determined the rates paid to coal miners. The court found the penalty violated no constitutional rights of employers because of procedural protections nearly identical to the statutory provisions for administrative hearing and appeal at DEP.

"The orders of the Commission are not final, but are subject to review under the statute of Ohio found in 103 Ohio Laws at page 95, where orders of the Commission are declared to be only prima facie reasonable, and any employer or other person in interest, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio to vacate or amend any such order upon the ground that the same is unreasonable or unlawful and the Supreme Court is authorized to hear and determine such action and may, in its discretion (Section 41) suspend all or any part of the order of the Commission. The statute makes

> provision for the prompt hearing of all such actions, in preference to other civil cases, with some exceptions. It would seem that this system of law, with a right to review in the manner we have stated in the Supreme Court of Ohio, has provided a system ample for the protection of the rights of employers." Rail Coal Co., pp. 348, 349.

It is clear that civil penalties for violation of a DEP order to abate that has been consented to or that has received judicial approval fall outside the application of the Young rule. However, this is not the situation presented by the Department's proposed accrual during litigation, since the validity of the order to abate will ordinarily be at issue in litigation in addition to the question of the reasonableness of the penalty.

Fortunately, other methods of safe and available access to the courts have been approved by the Supreme Court. In St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) defendant paper company disobeyed an order of the Federal Trade Commission without attempting any pre-violation challenge to the validity of the order. In defense to a suit by the F.T.C. for forfeitures for violation of the order the paper company claimed that no safe, available access to the courts was provided by the F.T.C. statute. The Supreme Court upheld the imposition of the forfeitures and rebuked the paper company for not having sought any pre-violation access to the courts.

> [A]s this matter comes nere now, the petitioner has pursued none of these [pre-violation] remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. [Citations omitted] We note, however, that the Declaratory Judgement Act 28 U.S.C. 2201, provides that, "In a case of actual controversy within its jurisdiction...any court...may declare the rights... of any interested party seeking such declaration..." This appears sufficient to meet petitioners' needs. St. Regis, p. 227.

The importance of the St. Regis case is that it clearly states that the existence of declaratory judgement procedures is adequate, safe and available access to the courts. Therefore, large lump sum and cumulative penalties may be imposed for violation of an order or statute even when their validity is still in question where declaratory judgement procedures were available but unused. Connecticut provides both administrative and judicial declaratory judgement procedures for those who question the validity of a statute or order. See C.G.S. Sections 4-175, 4-176, 52-29. No regulatee need disobey to determine the validity of DEP's application of an emissions standard to his case. Civil penalties for violation may therefore be as high as necessary to insure obedience whether or not regulatees are deterred from gaining access to the courts by violating the law.

b. The reasonableness of penalties under the Young rule.

The penalties prohibited by the Young rule are those that are "ruinous" and "unreasonable". In the Young case itself the penalties were both criminal and civil in nature and were up to $10,000 for a second offense (a huge sum in 1907) and five years imprisonment. The penalties applied to the lowest employee as well as the railroad company and its officers. In Missouri Pacific Ry. v. Tucker, 230 U.S. 340 penalties of $500 as "liquidated damages" for freight charges over prescribed rates were found to be unreasonable. The facts are as follows. The statutory rate was $12 a barrel, the railroad charged $15.02 a barrel and the shipper sued to collect $500 for having paid $3.02 more than the legal rate. The court felt that a penalty that was more than a hundred times the overcharge was too enormous to be sustained under the Young rule. In contrast, a lower federal court found that a fine of $100 or 30 days in jail or both fine and imprisonment was not excessive under Young. Portland Ry. Light and Power Co. v. City of Portland, 210 Fed 667 (1914).

Unfortunately, no general definition of reasonableness under the Young rule has been attempted by the courts. However, the rationale for the rule provides some guidance. First, it should be noted that the standard of reasonableness under the Young rule is more severe than the standard of reasonableness for penalties in general. A penalty that is reasonable for violation of an order whose validity has been established or tacitly accepted may be unreasonable under the Young rule. See the Cotting, Young, and Wadley cases. The essential logic of the Young rule is that if failure in the courts leads to a large loss then the risk of a court challenge will not be taken. Thus, a second rule of thumb drawn from the case law is that if failure in the court leads to no net loss, or a small one, then the penalty is reasonable. This point is supported by the Missouri Pacific Ry. case where the penalty struck down was well over one hundred times the actual benefit from violating the law.

Based on these considerations, it is likely that DEP's proposed penalties for litigative delay are reasonable under the Young rule. The proposed penalties take away from a violator only the amount that he has actually benefited from non-compliance. A regulatee who challenges the DEP in litigation and loses is in no worse shape than the regulatee who complies immediately upon detection. Of course, the regulatee who prevails in litigation pays no penalty at all. Thus, even if the state's declaratory judgement procedures did not exist, the proposed penalties would still satisfy the reasonableness test of the Young rule.

2. Penalties which accrue or cumulate because of or during litigation.

While any large penalty may deter regulatees from seeking access to the courts (this is the holding of the Young case), penalties which accrue because litigation has been undertaken or accumulate during the pendency of litigation are carefully scrutinized by the courts. Not surprisingly, the availability of alternate, unpenalized access to the courts and the reasonableness of the penalties are two important factors in judicial discussion of the issue. A third factor that is often cited is the merit, or lack thereof, in a regulatee's case, and a fourth issue is the right of a government to regulate access to its adjudicative forums.

In Oklahoma Operating Co. v. Love, 317 U.S. 331 (1920) the Supreme Court struck down penalties of $500 per day for violation of a law setting rates for a laundry citing the Young case. However, in dicta at the end of the case Justice Brandeis speaking for the court stated:

> The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the commission are, under present conditions, confiscatory...If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory. Oklahoma Operating Co., p. 338.

In the St. Regis case the problem of penalty accumulation during appeals was also raised, but the Supreme Court did not rule on it directly. The paper company had failed to ask for a stay of penalty cumulation until it brought the case to the Supreme Court. The court stayed accumulation during its hearing of the merits. Thus, it recognized a right of courts to stay accumulation but it failed to state the reasons for so doing. Moreover, it refused to strike the penalties that accumulated during the proceedings before the district and appeal court. The reason given for failing to strike those penalties was that the paper company had neglected to ask for a stay at the appropriate time. However, lest their move be interpreted as a rule that those who ask for a stay will get it, the court added in a footnote:

> [W]e stayed the accumulation of further penalties when the petition for writ of certiorari was granted. If petitioners had unsuccessfully sought a stay in the District Court, a different question might have been presented.

Thus, a definitive answer to the question of when it is appropriate to stay accumulation of penalties has not been provided by the Supreme Court.

One lower court has found that a stay of penalty accumulation is appropriate when the petitioner raises a substantial legal question. Genuine Parts Co. v. F.T.C., 445 F 2d 1382 (5th Cir., 1971). Another court refused to stay accumulation because the reasonableness of the order being violated had already been established. Florsheim v. Weinburger, 346 F. Supp. 950 (D.C.D.C., 1972). The conclusion is that penalties accumulated during litigation may be stayed but need not always be stayed.

Another issue is raised by lump sum penalties that accrue when an appeal is taken. Such a penalty -- a ten per cent increase on a damage judgement under a "wrongful death" statute -- was upheld in Louis & Nash. R.R. v. Stewart, 241 U.S. 262. The court reasoned:

> The first of the other objections is that the Court of Appeals was not authorized to add ten

> per cent damages on the amount of the judgment, as it did. But the Railroad Company obtained a supersedeas, and the law of the State makes ten per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as but for such proceedings interest would run as of course until the judgment was paid. Louis & Nash R.R., p. 263.

Of course, DEP's proposed penalties are, in fact, an interest charge on compliance that is due the State but denied because of litigative delay.

Similarly, interest is allowed to run on underpayments of federal income tax. The court upheld charges even though they increase the amount a tax payer must pay because of litigative delay. United States v. Childs, 266 U.S. 304 (1924). The court stated that "a penalty is a means of punishment; interest a means of compensation." Their reasoning is instructive:

> The imposition of a tax is certainly a function of government and creates an obligation, and the power that creates the obligation can assign the measure of its delinquency -- the detriment of delay in payment; and 14(a) has done so in this case, and explicitly done so. Five per centum penalty is the cost of delinquency, and interest upon the amount due at 1% per month -- 12% a year. Childs, p. 308.

What was said about interest on a tax can be said about interest in the style of a penalty for violation of pollution laws.

B. Connecticut Law.

The Connecticut courts apparently have never been asked to address the question of penalties for litigative delay. The general statement of the Connecticut law on the reasonableness of penalties is given in Walsh v. Gurman, 132 Conn. 58, 42 A 2d 362 (1945). In the Walsh case a penalty of $50 was imposed for each of seven rent overcharges of $3 under the Emergency Prices Control Act. The landlord pleaded that a penalty of $350 was unreasonable when his benefit had been $21. The court rejected the argument stating:

> In determining whether such penalties are so severe, oppressive, and unreasonable as to violate the due process clause, they should be tested not by comparison with the overcharges in particular instances but by the public inerest in having the prices uniformly adhered to, and the relation of the penalties to that object.
> Walsh, p. 365.

Interest during appeal on unpaid State taxes is authorized by C.G.S. 12-35 and has been upheld by the State's courts. See, for example, City of Hartford v. Hill, 72 Conn. 599, 45 A 433 (1900) and H.E. Vernan Co. v. Town of Stamford, 108 Conn. 47, 142 A 578 (1928). Interest on judgements pending appeal is permitted by C.G.S. 52-349 and has been upheld by the State's courts. See, for example, Clime v. Gregor, 145 Conn. 74, 138 A 2d 794 (1958). "Unless a verdict is set aside, judgement is entered as a matter of course and interest runs from the date of the verdict." Interest on workman's compensation during agency appeal is authorized by

31-300 and has been upheld by the courts. Balkus v. Terry Steam Turbine Company, (S. Crt. Conn. Law Journal, August 27, 1974, p. 17, 19/4).

C. Conclusion.

In the absence of any direct precedent in Connecticut regarding the constitutionality of penalties for litigative delay, the federal precedents provide ample favorable support for DEP's proposed penalties.

DUE PROCESS AND THE ASSESSMENT PERIOD

This memo details additional research concerning due process constraints on the accumulation of penalties during the period from notice to final order and during the course of litigation.

The main concern of the courts appears to be that the defendant not be inhibited in raising substantial legal questions. With regard to pre-final order accrual, the Supreme Court has asserted that it would stay accumulation when the prospect of final amounts appears "ruinous." And the F.T.C. has a statutory requirement forbidding any accrual until a final order is issued. With respect to litigative accrual, some Supreme Court cases and the practice of the IRS suggest that a cumulative penalty may be declared invalid if its running is not limited by either a specific time period or some other restraint.

Recent cases such as Sniadach raise the question of whether an initial administrative hearing may not be required before a notice of violation (which might affect ability to borrow money) can be issued. However, since the Sniadach series of cases referred to the garnishment of "necessary" items (wages, savings accounts, essential furniture), it is doubtful that extension to the environmental enforcement area will be made.

While due process constraints can be found in many outwardly similar situations, two features of the civil assessment system distinguish it from prior cases and are likely to render it immune from due process challenge:

(1) The availability of the declaratory judgment process; and

(2) The fact that assessments are directly related to economic benefit, so that in reality, a source does not "suffer" at all from assessment accumulation.

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SUBJECT

DUE PROCESS LIMITATIONS ON THE ACCRUAL OF THE CUMULATIVE CIVIL PENALTY

I. Whether due process requires the tolling of a cumulative penalty where a defendant appeals a final order of the commissioner.

The due process requirement implicit in the morass of case law on cumulative penalties is that a litigant not be barred from raising substantial legal questions in the appeal of administrative determinations because of the risk of ruinous penalties which may accumulate during the course of litigation. This requirement gains stark expression in the holding of Ex Parte Young 209 U.S. 123 (1907) which held unconstitutional on its face a state statute which required a litigant to risk enormous fines and possible imprisonment in order to test the validity of the statute. A more flexible application of the same due process requirement may be found in Wadley Southern Railway v. Georgia 235 U.S. 651 (1914) and in U.S. v. Pacific Coast and European Conference 451 F.2d 712 (1971). Wadley held that a party affected by a statute passed without his having an opportunity to be heard is entitled to a judicial review of its legality, and that a state may impose penalties sufficiently heavy to secure obedience to orders of the public utility commissions after the penalties have been found lawful or if the parties have had opportunity to test the validity of statutes but have failed to do so. The Pacific Coast case invoked a "tolling principle" which tolled the running of a cumulative penalty during an appeal which enabled the litigant to contest the validity of the statute under which it was being

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penalized. But both Wadley and the Pacific Coast case imply that there comes a time when the validity of a statute would no longer be a substantial issue and that a cumulative penalty may be imposed for failure to comply with an administrative order. The Pacific Conference case and another case also involving cumulative penalties Genuine Parts v. F.T.C., 445 F.2d 1382 (1971), make the determination of whether or not to invoke the tolling principle a matter for the discretion of the court. The court in Pacific Conference case would toll the penalty where the appeal raises a substantial question but not where the appeal is frivolous. Genuine Parts finds the test to be whether the appeal is brought in good faith, but both uphold the ability of the court to penalize litigation which is dilatory and calculated to secure benefits other than a full and fair determination of substantial legal issues.

The cumulative penalties held unconstitutional in Ex Parte Young can be distinguished from the civil penalty of the Enforcement Act because violation of the statutes enumerated in the act is not a misdemeanor and will not subject the violator to a term in prison. Nor is the civil penalty enormous or ruinous; rather it is calculated to eliminate any economic incentive for dilatory litigation. Thus it is unlikely that the civil penalty provision would be held unconstitutional on its face. On the other hand, due process appears to require that violators have opportunity to test the validity of the regulations. Thus the courts will probably permit tolling of the penalty except in notable instances of bad faith.

There is a Supreme Court case, St. Louis, Iron Mountain Railway and Co. v. Paul, 173 U.S. 404 (1898) concerning an Arkansas statute which requires railroad companies to pay back wages to discharged employees where cumulative penalties were held constitutional. The cumulation of penalties occurred on a per diem basis, each day's penalty being equal to the company's liability under the rate of the discharged employee's contract, but the cumulation normally ended in sixty days unless the employee initiated a legal action. In this case the penalty continued until it was merged in the judgment or unless the company offered to pay the wages due. The cumulation of penalties was considered to result from the company's own failure to perform a duty. The court below reasoned that

> The act...does not arbitrarily impose a penalty, but it enjoins a duty, and imposes a penalty, for failure to discharge the duty. It was enacted by the legislature in the exercise of the power to regulate railroad companies for the advancement of the interest of the public and for the protection of their employees against the unnecessary withholding of their earnings, and consequent injuries. St. Louis, I.M. & S.R. Co. v. Paul 64 Ark. 83, 40 S.W. 705(1897).

The Supreme Court upheld the statute, finding that it neither impaired the right to contract nor violated the Fourteenth Amendment. (See additional cases upholding cumulative penalties 36 Am Jur 2d at 646).

The cumulative penalty in St. Louis resembles the cumulative penalties provided in the Internal Revenue Code[1] in that the penalties may only run for a stated length of time. This similarity may be explained by the rule cited in Beckler Produce Co. v. American R. Exp. Co. 156 Ark. 296, 246, SW1 that if cumulative penalties run only for a stated length of time where suit is not brought, such factor prevents them from becoming excessive and unreasonable. At any rate, the St. Louis case and IRS practice suggest that where a cumulative penalty is imposed it may be considered invalid if its running is not limited by a time period or some other constraint.

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[1] See e.g. sec 6651. The penalty for failure to file a tax return or to pay tax is 5% of the amount for each month but not to exceed 25% of the tax.

II. What guidelines do the cases provide with respect to the application of a cumulative penalty during the period from notice to the final order of the commissioner.

The cases provide little guidance. Due process requires that any procedure offered protection for the substantial rights of the litigants, but its requirements are "not technical, nor is any particular form of procedure necessary" Mitchell v. Grant 94 S. Ct. 1895, 1901 (1971), Inland Empire Council v. Mills 235 U.S. 697, 710 (1945).

The primary concern of the courts has been whether the civil penalty may inhibit the defendant in raising substantial legal questions. The dicta in U.S. v. Morton Salt 338 U.S. 632 (1950) suggests that the cumulative civil penalty presents few due process concerns which may not be corrected by an appeal to equity. There as in St. Regis Paper Co. v. U.S., 368 U.S. 208 (1961) the court sustained the accumulation of a civil penalty for failure to provide information to the F.T.C. after the commission had issued a final order. The court said that if the government had delayed suit for the penalty while ruinous penalties accumulated the courts would not be powerless to provide a remedy.

> We are not prepared to say that courts would be powerless to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity.
>
> U.S. V. Morton Salt 338 U.S. 632, 654 (1950).

The FTC procedure which is statutory provides clear protection for the right of the litigant to appeal. Under this procedure penalties for violation of the statutes cannot accrue until a final order is issued and a final order cannot issue until the period for initiating an appeal has run or has been otherwise terminated. Although additional penalties may be imposed for failure to comply with the final order where an additional penalty is imposed the defendant has time to apply for a declaratory judgment as to the validity of the additional penalty before it begins to accrue. See Genuine Parts, supra.

The fundamental question is whether DEP must defer to the due process requirement to the extent of the F.T.C. procedure and that question is not answered by the cases.

In the situation where the penalty accrued in every case from the date of notice of violation the right to raise substantial questions as to the validity of the statute would be penalized. The question of whether opportunity to obtain a declaratory judgment from the courts on questions of law would satisfy due process is not resolved by any of the cases examined here. Also it is not clear that the declaratory judgment is available before administrative remedies are exhausted. If Connecticut requires exhaustion of adminsitrative remedies before appeal to the courts, accrual from the date of notice would probably penalize the defendant unduly. On the other hand, if the Commissioner was given discretion to stay the penalty in cases where the legal issues presented are substantial, he could more readily be perceived as acting arbitrarily and the number of appeals would probably increase.

III. Whether the due process requirements of Sniadach, Household Finance and Fuentes limit the imposition of the civil penalty where there are violations of statutes and regulations which protect the environment.

Sniadach v. Family Finance Corp. of Bay View 395 U.S. 337 (1967) and Lynch v. Household Finance 405 U.S. 538 (1972) found an unconstitutional violation of due process in garnishment procedures whereby a creditor could garnish wages and savings accounts merely by serving notice on the wage earner without providing the garnishee opportunity to present his defenses. Fuentes v. Sheven 407 U. S. 67 (1972) found a similar violation of due process in a replevin procedure where goods sold on an installment plan could be recovered in a similar ex parte proceeding which also deprived the buyer of an opportunity to present his defenses. These cases raise the question whether Connecticut courts might find that due process requires that an administrative hearing precede any determination by the Commissioner which results in the placement of a notice in the land records. While such notice does not affect title to land, it might affect the ability of the land owner to borrow money since it gives notice of his potential liability for a large money judgment. The similarity of the garnishment and replevin procedure with this notice requirement is slight. Garnishment and replevin procedures deprives an individual of the use or possession of property in which he has a present interest while the notice in the land records affects potential rights only. Furthermore, a recent supreme court decision Mitchell v. Grant, qu S. Ct. 1875 (1974) affirmed validity of the statutory process of sequestration which was an exparte proceeding similar to replevin which required a bond to indemnify the buyer and an affadavit asserting vendor's lien. In affirming the Louisiana statute the court explained that in its view, the statutory process accomodated the conflicting interests of the parties (at 1900), and emphasized that the requirements of due process vary so long as the substantial rights of the parties are protected (see numerous citations at 1901). Thus Mitchell appears to mark the outer limit of the recent line of case tending to invalidate ex parte proceedings affecting property rights. Fuentes, Household Finance and Sniadach may be distinguished also on the basis of the fact that the property garnished, or subject to replevin, consisted of necessary items -- wages, savings accounts, and essential items of household furniture.

IV PROCEDURAL AND MISCELLANEOUS ISSUES

THE WARNING LETTER

This memo examines two related procedural questions. The first is if and for how long the Department can delay issuing a notice of violation after it has reason to believe that a violation has occurred. The second is whether the Department can establish a procedure (the warning letter) not specifically mentioned in the statute.

Under a "plain meaning" interpretation of §2((d) of the Enforcement Act, which employs the auxiliary verb "may", the timing of the notice of violation is within the full discretion of the Commissioner. Although "may" is sometimes construed to mean "shall", in Connecticut this is done only when such a construction is deemed necessary for preserving public or third party rights. The delay option for the Commissioner interferes with no right; it preserves the regulatee's personal notice and it enables the Commissioner to preserve his option to select the most appropriate enforcement device.

Although there is no express statutory provision for the warning letter device, it is within the Commissioner's authority. Connecticut administrative law provides great discretion to an agency to implement a remedial statute in any way necessary for carrying out the purposes and objectives of the statute. Moreover, it is within the express authority granted to the Commissioner to promulgate procedural regulations necessary to carry out his duties and responsibilities.

II. E. PROCEDURAL PROVISIONS

1. WARNING LETTER

TO: CPEP Staff
DATE: November 8, 1974
FROM: Phil Reed
SUBJECT: Analysis of WARNING LETTER PROVISION

The Civil Penalties Regulations for Emission Violations include a number of procedural steps that are not expressly authorized by the statute. One of these provisions is in §22a-6b-602(g)(4) which requires the Commissioner to send a violator a warning letter on discovery of the violation. Another is in §22a-6b-602(f) which allows a hearing officer to delay issuing all or part of a final civil penalty order until accurate cost of compliance information is available.

This memo examines the warning letter provision; the memo following addresses hearing deferral.

§ 22a-6b-602(g)(4) of the proposed civil penalty regulations provides that:

> If the Commissioner has reason to believe that an emissions violation has occurred, he shall send the responsible regulatee a warning letter by certified mail or by personal delivery. The letter shall notify the regulatee of such reason to believe a violation has occurred, and that the regulatee may be liable for the assessment of civil penalties under this section unless it takes prompt and effective action to come into compliance.

This warning letter supplements the notice provision of the Act (Section 2(d)) which states that:

> If the Commissioner has reason to believe that a violation has occurred for which a civil penalty is authorized by this section, he may send to the violator, by certified mail, return receipt requested, or personal service, a notice which shall include:

(1) A reference to the sections of the statute, regulation, order or permit involved;
(2) A short and plain statement of the matters asserted or charged;
(3) A statement of the amount of the civil penalty or penalties to be imposed upon finding after hearing that a violation has occurred or upon a default; and
(4) A statement of the party's right to a hearing.

A Notice of Violation provision identical to the statute's was promulgated as §22a-6b-101(a) of the General Provisions of the Civil Penalties Regulations, and applies to all cases. Thus, the warning is a supplementary procedural provision which the Commissioner has proposed to provide additional notice to sources which may be subject to civil penalties.

A warning letter provision differs from the notice of violation provision in two respects.* On discovering an emission violation the Commissioner "may send" a notice of violation, but "shall send" a warning letter. In addition, the notice of violation is the first step in the imposition of a civil penalty, while the warning letter is merely a sign of potential use of the penalty device. Thus the notice of violation will not necessarily be issued immediately upon detection or to all violators. However, all violators will receive notice of their potential liability for civil penalties from the warning letter. When, and if, civil penalties proceedings are instituted, they will receive notice of that in a notice of violation.

The warning letter provision calls attention to two issues. The first is if and for how long the Commissioner can hold back a notice of violation after having reason to believe a violation has occurred for which a civil penalty can be assessed. This involves questions of statutory construction and administrative law.

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* The two notice instruments vary somewhat in content, but these differences are not important here.

The second issue is whether the Commissioner can establish a procedure (the warning letter) not specifically mentioned in the statute. This raises questions of administrative law.

Discretion to Defer Issuance of Notice of Violation

Under a "plain meaning" interpretation of § 2(d) of Public Action 73-665 the Commissioner would have discretion to issue a notice of violation at any time at which he has reason to believe a violation has occurred for which a civil penalty is authorized. The basic meaning of "may" is to have permission to or to have liberty to (see, Webster's New Collegiate Dictionary, 1973 edition, p. 711). It does not mean to have an obligation to. See McCarthy v. Thames Dyeing and Bleaching Co., 130 Conn. 652(1944); Stolman v. Boston Furniture Co., 120 Conn. 235 (1935); Goodchild and Partner, Ltd. v. Ready Tool Co., 100 Conn. 378(1924); Rubin v. Lipson, 96 Conn. 281 (1921); Murdoch v. Murdoch, 81 Conn. 681(1909); State v. Conlon, 65 Conn. 478(1895). There are even cases in which "shall" was held to mean "may". See e.g. Hopkins v. Hamden Board of Education, 29 Conn. Sup. 397 (1971). Under this interpretation the Commissioner could, but would not have to, issue a notice of violation as soon as he has reason to believe a violation has taken place for which civil penalty liability may lie. So long as he has grounds for believing such a violation happened and is not barred from starting a civil penalty action by any statute of limitations he could issue a notice of violation at any time he chose. The Commissioner is not, therefore, barred from issuing a warning letter or other informal notice prior to issuing a statutory Notice of Violation.

The question is not this simple, however, because the word "may" is often not given its "plain meaning" in interpretations of statutory provisions. There are numerous cases in which "may" has been held to mean "must"or "shall." see West Realty Co. v. Ennis, 147 Conn. 602(1960); State v. Palmieri, 143 Conn. 569(1956); Walling v. Robertine, 134 Conn. 659(1948); State ex rel Markley v. Bartlett, 130 Conn. 88(1944); LaGarda, Inc. v. LeWitt, 126 Conn. 588(1940); State ex rel Foote v. Bartholomew, 103 Conn. 607(1925); Capobinco v. Samorak, 102 Conn. 310(1925); Burnap v. Water Commissioners, 94 Conn. 286(1920); State v. Richards, 74 Conn. 57(1901); Lyon v. Rice, 41 Conn. 245(1874). This is such a common interpretation that the dictionary even takes it into account. "May" is said to mean "shall" or "must" in law where the sense, purpose or policy requires this interpretation (Webster's New Collegiate Dictionary, 1973 edition, p. 711). This is not such a common use of "may" in statutes that the courts treat it as its plain meaning. In each of the above cases the court spelled out specific reasons why the permissive interpretation of "may" was not appropriate in the statute involved. No such reasons exist here, however ; to the contrary, proper reasons exist for conferring discretion to the Commissioner not to have to issue Notices of Violation in all cases, viz., management of state enforcement resources, design and implementation of effective enforcement policy, and fairness to sources subject to civil penalty liability.

The Connecticut Supreme Court has set out two broad standards for interpreting the word "may" as "shall," but has also looked to specific characteristics of the act in question. These factors are discussed and applied to Public Act 73-665 in the following paragraphs.

The first standard was set out in State v. Conlon, supra, at 487 in which the court held that "may" did not mean "shall." In that case the court said:

> It would be our duty to construe 'may' as 'shall' if necessary to give effect to an Act, and the context would permit that construction.

See also, LaGarda Co., Inc. v. LeWitt , supra, at 590-1 and Walling v. Robertine, supra, in which the court applied the same standard but came to the opposite conclusion. The Conlon case involved a statute that stated that the mayor of a certain city "may issue" licenses to persons he deems proper to carry on specified businesses. The court held that to interpret "may" to mean "must" would not give effect to the Act in that it would deprive the mayor of discretion the act clearly intended him to have because of the language about licensing "proper persons." The statutes in LaGarda and Walling provided that appeals and writs, respectively, from several lower courts "may" be taken to a specified higher court. The Connecticut Supreme Court held that "may" was discretionary in one sense and mandatory in another. Appeals and writs could only be taken to the court named in the statute;

but they did not have to be taken in every case (a result the courts said would have been indicated if the word "shall" had been used). In effect the court in all these cases looked to the intent of the statute, the effect of interpreting "may" in each of the alternative senses and chose the one that gave the most reasonable result.

The second standard for construing "may" to mean "shall" was well stated in Capobinco v. Samorak, supra, at p. 313;

> The word 'may' in a statute, will be construed to mean 'shall' whenever the rights of the public or if third persons depend upon the exercise of the power or the performance of the duty to which it refers. (quoting from Brokaw v. Commissioner of Highways, 130 Ill. 482,490, 22 NE 596.)

This statement was repeated in State ex rel Foote v. Bartholomew, supra, at p. 612, and State ex rel Markley v. Bartlett, supra, at p. 93. In addition the Court relied on it without spelling it out in a number of other cases, including Lyon v. Rice, supra, State v. Richards, supra, State v. Palmieri, supra, and Burnap v. Water Commissioners, supra. In Capobinco the statute provided that a court "may" order a new attachment bond in certain circumstances and "may" if the order were disobeyed, render a default judgement for the plaintiff. The court held that this gave the plaintiff a right to a default judgement if the conditions of the statute were met and thus required a mandatory interpretation of "may." The statute in Foote stated that the board of tax relief "may" place property omitted by the assessor on the tax list. The court held that this was a mandate, not permission, because the question of the taxability of the property was a question of law and the public interest required enforcement of the law. In the Markley case the statute stated that a medical examining board "may accept" licenses issued in other states if specified conditions were met. The court held that the board "must" accept the licenses if the conditions were met, because the rights of specified individuals to practice their chosen profession were involved. The statute in Lyon provided that special town meetings "may be convened when the selectmen shall deem it necessary, or on application of twenty inhabitants qualified to vote in town meetings," at 248. The court held that the selectmen were required to hold the meetings upon proper application. Any other meaning would render the second phrase of the statutory directive redundant. It stated at p.248 that the "statute established a right to have a town meeting upon appropriate request and therefore a duty in the selectmen to hold it." In the Richards case a city charter stated that the common council "may limit" the time in which individual property owners could comply with regulations concerning proper sidewalks, etc. The court held that the council had to state such limits, because the certain time limits triggered criminal prosecutions for failure to satisfy the sidewalk standards. In Palmieri the statute stated that after leaving office a municipal court judge may finish up matters begun before going out of office. The court interpreted this as a duty, because any other result could jeopardize the rights of parties in such matters to full legal process. In the Burnap case the statute stated that the board of water commissioners "may appoint" a superintendent of water works and "may fill a vacancy" that occured in the office. The court held that "may" meant "shall" because it was in the public interest that the positions created by the legislation be filled. In the above cases, as in those involving the Conlon standard, the court looked at the effect on the legislation of the alternative interpretations of "may." In these cases it looked to the legislative intent concerning individuals and the public and chose the interpretation that protected their rights and interests created by the legislation as well as to the general reasonableness of the result.

A third group of cases involved a variety of ad hoc decision rules. In some the court went through a Conlon-like analysis; in others it looked to specific narrow features of the statute in question. West Realty involved a municipal code that prohibited repair of non-fireproof buildings that had been damaged to the extent of 50% or more of replacement costs. The code also stated that such a building "may" be condemned. "May" was held to be an imperative since otherwise half-destroyed buildings could be left standing for long periods. It was argued that could not have been the intent of the legislature. Stolman involved a statute which said a court "may," on a finding of sufficient cause, place a corporation in receivership or dissolve it. The Connecticut Supreme Court said that the provision gave the court discretion to establish a receivership or dissolve the corporation because of the use of "may" combined with the requirements of a finding of "sufficient cause." As was true in Conlon, the court looked to additional language of discretion in interpreting "may." Such language is not a prerequisite of such a finding, however. In Murdoch the court interpreted a statute under which any court of probate may modify or revoke any order or decree it issued ex parte at certain times or on application by an interested party. Without much discussion the court held that the provision gave the court discretion to modify or revoke. In McCarthy the court interpreted a statement which stated that where a party fails to comply with a rule or order of the court as to pleadings, the court "may" grant a nonsuit. The court held that "may" indicated discretion, because a mandatory reading would go against sound principles of procedure. In Rubin the statute involved venue and used "may." The court construed "may" as a permissive, not limiting, word. An important element in its decision was the fact that the section of the statute under consideration used both "may" and "shall," which suggested an intention to give them different meanings. In addition, the court noted that a "shall" construction would have been unreasonable since it would deprive persons from one county of a choice of venue available to residents of all other counties in the state. In Goodchild the court relied on the history of the statutory language. The statute stated that a court may reject depositions written by certain interested persons. The court decided that this indicated discretion because a previous version of the same provision had used the word "shall." Thus the court will look to other language in the same or related sections of the statute, and in past versions, as well as to the reasonableness of the result in terms of the statutory purpose and the impact on affected individuals and the public in interpreting provisions using the word "may ".

Application of the above principles and decisions to section 2(d) of Public Act 73-665 leads to the conclusion that the General Assembly intended to give the Commissioner discretion concerning the timing of the issuance of a notice of violation. The context of the provision does not require a "shall" interpretation and such an interpretation is not necessary to give effect to the act. In fact, in applying this standard it is clear that a permissive interpretation is needed. Such a construction of the provision does not interfere with the rights of the public or of individuals. Finally, other statutory language indicates a legislative intent to give the Commissioner discretion. These points are elaborated below.

The Conlon standard draws attention to the context of the statutory provision in question. When viewed in context it is clear that section 2(d) was intended to invest the Commissioner with discretion. The statute sets out seven criteria, including "the amount of the assessment necessary to insure immediate and continued compliance(Section 2(c)(1)) which the commissioner can consider in setting a civil penalty (Section 2(c)). It is reasonable to assume that the legislature intended him to have the discretion to delay issuing a notice until he had sufficient information to consider those of the criteria which he deemed most relevant. It would be difficult to determine what penalty would meet the criterion of § 2(c)(1) without knowing the cost of compliance and therefore the economic benefit of noncompliance. Since in some cases cost of compliance data could be unavailable for a period after discovery of the violation, mandating the Commissioner to issue a Notice of Violation immediately after detecting a violation could frustrate the express obligation of the Commissioner to determine the amount necessary to achieve compliance when issuing a Notice of Violation. Similar arguments could be made about other criteria in Section 2(c).

The Conlon standard also raises the issue of the basic statutory purpose. The civil penalties established by Public Act 73-665 were intended to supplement the existing enforcement tools of the Department of Environmental Protection and not to be used in every case.

For instance, in the Senate debate on the bill Senator Costello, one of its sponsors, observed:

> Technical amendments are included which will allow the Commissioner's (sic) discretion in issuing orders to abate pollution or requesting assistance from the Attorney General.

Some of the technical amendments referred to are included in sections 8 through 13 of the act. They change the language of other enforcement provisions so that the Commissioner "may" rather than "shall" resort to them when the requisite conditions occur.

Goodchild and Partners, Ltd. v. Ready Tool Co. established that this sort of amendment indicates an intent to change the interpretation of the word. The fact that section 2(d) reads "may" and the same piece of legislation amended similar provisions relating to other enforcement devices to read "may" instead of "shall" is an unequivocal expression of legislative intent as to the meaning of "may." Moreover, other parts of section 2 (enforcement act) employ the word "shall" (see section 2(c) and 2(i)). As Rubin v. Lipson, supra, established this is strong evidence of a legislative intent that "may" does not mean "shall." Thus, section 2(d) clearly gives the commissioner discretion in the timing of sending notices of violation.* The Murdoch and McCarthy cases indicate that when applied to areas of established discretion "may" will be given a discretionary interpretation.

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*This result is in accord with general principles of administrative law. Agencies generally have broad discretion in employing their enforcement tools; an analogous situation to prosecutional discretion in criminal matters (see Davis, Administrative Law Treatise, 1970 Supplement, Section 200.4, pp. 50-52.)

Furthermore, section 2(i) of the act specifically states that:

> The provisions of this act are in addition to and in no way derogate from any other enforcement provisions contained in any statute administered by the Commissioner. The powers, duties and remedies provided in such other statutes, and the existence of or exercise of any powers, duties or remedies hereunder or thereunder shall not prevent the Commissioner from exercising any other powers, duties or remedies provided herein, therein, at law or at equity. Section 2(i).

It is clear from this provision that the civil penalty is to be used in a way that will not weaken the Commissioner's other enforcement tools. However, if he did not have discretion to delay imposition of the penalties it would detract from his ability to use other enforcement devices. If he did not have discretion not to issue Notices of Violation in every case, he would be barred from using other remedies entirely. See § 1, Public Act 73-665. This is not what the legislature intended, and it has said so in express language. The interpretation of section 2(d) that gives the commissioner discretion thus conforms to the Conlon standard.

This interpretation also conforms to the Capobinco standard. It does not infringe rights created by the statute in individuals or the public. The individual regulatee's right to notice of his liability for penalties is preserved. The notice of violation must still be given before the penalties can be imposed. This is clearly different from the case in State v. Richards, supra, where the notice of a time limit was essential for a property owner to know when he would become liable for criminal penalties. Furthermore there are no rights of individuals to practice their professions involved here as was the case in State ex rel Foote v. Bartholomew, supra and State ex rel Markley v. Bartlett, supra. Since the penalty for past delay cannot be involved for this period unless the regulatee had actual knowledge of his obligation to come into compliance with environmental standards (see Section 22a-6b-602(g)(4)) there is no interference with individual rights. Nor is there interference with public interests. The public has an important interest in the enforcement of environmental laws. This interpretation of Section 2(d) does not interfere with that interest. It enables the Commissioner, who is charged with enforcement of those laws, to choose the enforcement tool that will be most effective in a given situation. (Contrast Burnap v. Water Commissioners, supra). Thus the discretion reading of section 2(d) does not violate the standard set out in Capobinco.*

Authority to Prescribe Warning Letter by Regulation

Since it has been shown that the Commissioner has discretion to delay issuing a notice of violation, the next issue is whether he has authority to adopt the warning letter provision of the proposed regulations. There is no statutory prohibition against this or any other procedural provision. On the other hand, there is no express authority for the warning letter provision. The Commissioner does have the broad authority to adopt such regulations necessary to carry out his statutory duties and responsibilities. (Section 3 of Public Act 73-665.) The question then is whether the Commissioner has the power, based on his express, broad rule-making power and his implied and incidental power, to establish procedural steps such as the warning letter provision in regulations.

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* Even if it did, the fact that it is necessary to give effect to the act (Conlon) might well cause a court to approve it. None of the above cases discussed such a conflict.

The basic principles governing rule-making discretion have been discussed in the section concerning statutory interpretation. A brief summary of these principles reveals that an administrative body

> can exercise only the powers which are expressly granted to it by statute or such as are necessary to enable it to discharge the duties and carry out the objectives and purposes of its creation.

Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109, 115 (1970). Regulations must be promulgated "by virtue of express provisions of law" or "such as are by fair implication and intendment incidental to and included in authority expressly conferred." John J. McCarthy v. Alsop, 122 Conn. 288 (1937). Here, the authority to adopt procedural regulations is expressly conferred by statute, § 22a-6, C.G.S. Moreover, the warning letter is necessary to enable the Commissioner to discharge his duties and carry out the purposes and the objectives of the Enforcement Act.

As regards individual cases, the statutory purposes and objectives are stated in Section 2(c), viz., to consider the factors prescribed therein in assessing civil penalties. As indicated earlier, the information necessary to determine the proposed penalty to be prescribed in a Notice of Violation may not be available at the time of detection. The warning letter thus provides time for the Commissioner to continue his investigation while providing notice to the source of possible liability. It is necessary to enable the Commissioner to determine preliminarily the amount required to insure compliance for purposes of issuing a Notice of Violation.

While courts scrutinize challenged regulations to determine if they have an adequate basis in statute, once such basis is found, regulations are overturned only where there is a significant break with the statute. The warning letter introduced in the civil penalty regulations is readily distinguishable from regulatory provisions that have been overturned by Connecticut courts as deviations from statutory schemes. It is no more than a detail"for regulating the mode of proceeding to carry into effect the law as it has been enacted," which is clearly within the authority of the Commissioner. (24 Opinion of the Attorney General 175 (Dec. 6, 1945).

In Hartford Electric Light Co. v. Sullivan, 161 Conn. 145 (1971) a statute provided for tax assessments on certain specified assets. The State Tax Commissioner had by regulation provided for assessment on a broader class of assets due to a mistaken interpretation of the statute. The Court held that the regulations were invalid because they were broader than the statute authorized and because there was no clear grant of power in the statute for the Commissioner to go beyond the statute in rule-making. In contrast, the procedure introduced in the civil penalties regulations would not in any way broaden the coverage of the program.

In South East Property Owners and Resident's Association v. City Plan Commission, 156 Conn. 587 (1968), the Commission enacted a regulation setting a maximum length for a certain type of street in subdivisions. In another regulation it set up a procedure for granting variances from the other regulations. The court found that the statute did not authorize the Commission to grant variances and therefore voided the offending regulation. The civil penalty regulation in question would not increase the power of the agency, as the variance regulation did in this case.

In Finn v. Planning and Zoning Commission, 156 Conn. 540 (1968), the statute in question (CGS Section 8-26) required that the Commission act on submitted plans within 60 days, and made failure to do so operate as approval. The Commission promulgated regulations setting up a two stage procedure. The first step called for the submission of an initial plan for preliminary approval. After approval the applicant had 90 days to submit a final plan on which the Commission would act within 60 days. The scheme was a clear cut attempt to draw out the approval process to enable it to do a more thorough job. The court invalidated the scheme. It first noted that there was no provision in the relevant statutes (Sections 25,8-26 CGS) giving specific authority to the Commission to provide for such a procedure. It then noted that "the whole field of subdivision regulation is peculiarly a creature of legislation," quoting from 2 Yokely, Zoning Law and Practice (3rd Ed.) Section 12-3. The next link in its reasoning was the following argument:

> in order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather we must search for statutory authority for the enactment. 156 Conn. at 545 quoting from Avonside, Inc. v. Zoning and Planning Commission, 153 Conn. 232, 236 (1965).

Finally the court noted that the statute provided for a single application to which the agency was to respond within 60 days. The regulations provided for an application and a plan submission but the court argued that in fact this meant two applications and was an unauthorized administrative change in the statute.

The Finn case is of particular relevance to the civil penalty deferral question. There are some parallels between the Finn Commission's scheme and the warning letter provision. There are also important differences, however. The delay in the subdivision case can well be costly to the applicant as it delays the development of his or her land. In the civil penalty case there is no harm to the violator. Moreover, the guarantee of informal notice of potential civil penalty liability to the violator from the warning letter would give the violator an opportunity to avoid harm by rapidly complying with an abatement order. The applicant had no such option under the Finn procedure, and the court noted that the 60-day limit was "for the protection of the subdivider," 156 Conn. at 544.

Hammerberg v. Holloway, 131 Conn. 616 (1945), involved regulation of milk prices. The price was to be determined in part by the butterfat content of the milk, which was to be determined by a standard test, the steps of which were set out in the statute. The Commission used a variant of that testing procedure which significantly raised the possibility of inaccuracy. This procedure was apparently within the Commission's regulations, but the court overturned Commission pricing decisions based on the faulty testing. It noted that the power to promulgate regulations did not empower the Commission to override the express provisions of the statute. Unlike these modifications, the civil penalty modifications increase the fairness of procedures to the regulatee.

The case of Oles v. Liquor Central Commission, 10 Conn. Sup 489 (1942) involved a Commission regulation calling for the certification of all employees of liquor permittees. This was promulgated pursuant to a statutory provision prohibiting the employment of persons in liquor-selling establishments who did not meet the standards required of permittees. A certification system for permittees was in effect and had been upheld. The Oles court overturned the regulation, holding that the certification of all employees in question was such an enormous task that the legislature could not have intended that the Commission undertake it. The warning letter introduced in the civil penalty regulations would have a much smaller impact on the agency's costs.

Conclusion

In summary,the warning letter provision is within the express authority of the Commissioner to adopt procedural regulations necessary to carry out his duties and responsibilities. It is also necessary to avoid frustrating the administration of Section 2(c) of the Act, and is consistent with his discretion to delay issuance of Notices of Violation or to use alternative enforcement tools. Finally, it is consistent with the case law in Connecticut setting forth the limits of discretion in adopting regulations to implement statutory mandates.

PR/kk

HEARING DEFERRAL AND PARTIAL FINAL ORDER

This memo examines the question of statutory authority and due process raised by §602(f) of the regulations, which permits a hearing deferral and the issuance of a partial final order if information necessary to an accurate determination of the civil penalty amount is not available at the scheduled time for the hearing.

It may be argued that the scheme set forth in 602(f) is not expressly authorized by §2(d) of the Enforcement Act, which contemplates a hearing and appeal of the complete notice of violation. At the same time, however, the agency has substantial discretion to conduct administrative proceedings in order to develop a full and complete record and make an informed reasoned decision. The hearing scheme is itself ancillary to a much larger plan for the implementation of the Act, and that the overall plan is a reasonable application of administrative expertise in pursuing a remedial objective.

With regard to due process, a provision for delay is of itself highly unlikely to constitute a violation; even the federal APA calls for a consideration of conveneince and necessity in setting the time for a hearing. If the cost of compliance approach meets with approval, there should be no difficulty in establishing the necessity for deferral. An egregious application of the provision in a particular case, however, might be untenable if it severely inconvenienced the regulatee for no sufficient administrative purpose.

II. E. Procedural Provisions
2. Deferral of Hearing/Partial Final Order

MEMORANDUM

TO: CPEP Staff DATE: November 5, 1974

FROM: Andy Weissman SUBJECT: Legal Analysis of Proposed Regulations Section 602(f)

I. Introduction

Section 602 (f) of the proposed regulations provides for a possible deferral of the statutorily required administrative hearing reviewing a decision to impose a civil penalty, and the issuance of only a partial final order, if "information important to an accurate determination of all or part of the civil penalty amount is not available at the time of the hearing but will become available later." This memo addresses the problem of whether §602(f) can be adopted as a valid regulation of the Department. Two basic issues are presented: first, is the provision for the division of review and the issuance of a partial final order, with the undecided issues to be tried and acted upon at a later date, acceptable as a regulatory promulgation under Public Act 73-665; and second, is the resulting delay in deciding some issues violative of due process standards?

II. Does Section602 (f) Go Beyond Statutory Authority?

The standards for testing the validity of rule-making by administrative agencies are broad, but ultra vires actions are possible. The scope of rule-making powers was perhaps best stated in 30 Op. At. Gen. 135 (March 24, 1958):

> "A public administrative officer may make or adopt only rules and regulations which carry into effect the will of the legislature as expressed by the statute . . . .
>
> He may not make or adopt a rule or regulation in contravention of, or out of harmony with, a statute, . . . and he may not, by the adoption of a rule or regulation, amend, alter, enlarge, or restrict the terms of a legislative enactment. He may not, under the guise of regulation, . . . change the purpose and the effect of the law."

Similar rules have been enunciated by the Connecticut courts. In John J. McCarthy Co. v. Alsop, 122 Conn. 288 (1937), the Court stated that regulations by the Public Utilities Commission must be promulgated "by virtue of express provision of law" or they must be rules "such as are by fair implication and intendment incident to and included in authority expressly conferred." In *Loglisci v. Liquor Control Commission*, 123 Conn. 31 (1937), the rule stated was that "the authority of the administrative body acting under [a legislative] grant of power, is limited to the making of reasonable rules and regulations within the scope of the power granted." See also *Aunt Hack Ridge Estates, Inc. v. Planning Commission*, 160 Conn. 109, 115 (1970) (planning commission can exercise "only the powers granted to it by statute or such as are necessary to enable it to discharge [its duties]"); *State ex rel. Huntington v. McNulty*, 151 Conn. 447, 449 (1964) (no regulatory body can modify the statutory powers under which it acquires authority without specific legislative action); *Hartford Electric Light Co. v. Sullivan*, 161 Conn. 145, 155 (1971); *Finn v. Planning and Zoning Commission*, 156 Conn. 540, 546 (1968); *Hammenberg v. Holloway*, 131 Conn. 616 (1945); *Dadiskos v. Liquor Control Commission*, 150 Conn. 425 (1963).

The application of these broad standards is difficult to pin down exactly, but some consistent factors can be gleaned from the cases. Almost every case which has invalidated a rule or regulation promulgated by a Connecticut administrative or regulatory agency has involved a direct conflict with the controlling statute. Thus, in *Hartford Electric Light*, *supra*, the statute provided for tax assessments on specified assets. The Tax Commissioner, however, provided by regulation for an assessment on a broader class of assets due to a mistaken interpretation of the statute. In *Finn v. Planning and Zoning Commission*, *supra*, the statute required that the Commission act on submitted plans within 60 days. The Commission attempted through regulations to extend this period in order to allow it to act with greater information and analysis. The

Court invalidated the scheme. In Hammenberg v. Holloway, supra, statutory provisions called for the regulation of milk prices based in part on the butterfat content of the milk. The statute set out the steps of the test to be used to determine butterfat content. The use of a different method of measurement by the State agency was rejected by the Court. See also Oles v. Liquor Control Commission, 10 Conn. Sup. 489 (1942); State ex rel. Basking v. Bartlett, 13 Conn. Sup. 463 (1945).

South East Property Owners and Presidents' Association v. City Plan Commission, 156 Conn. 587 (1968), might be perceived as an exception to the "direct conflict" rule, but this would be inaccurate. There, the planning Commission failed to enforce its own regulation by granting a variance. The controlling statute was not in direct conflict, but did fail to authorize the grant of any variance. The Court overruled the variance, stating it was not within the Commission's power to create any exceptions to its regulation. Reliance on South East as a case rejecting the "direct conflict" rule is mistaken because first, the relevant regulation permitted the proposed scheme only under specific conditions that were not met in the instant case, and second, the Connecticut courts have interpreted planning and zoning statutes extremely narrowly and sui generis. See Finn v. Planning and Zoning Commission, supra.

The "direct conflict" rule is supported by those cases which uphold rules and regulations that go beyond the statute, but are not in direct conflict with it and effectuate its purposes. In John J. McCarthy Co. v. Alsop, 122 Conn. 288 (1936), the Court upheld a regulation requiring carriers to hold insurance with a Connecticut-based company as a reasonable method of implementing a statute requiring the Public Utilities Commission to issue common carrier licenses only to persons who had adequate financial responsibility. In Dadiskos v. Liquor

Control Commission, 150 Conn. 425 (1963), the statute set out several grounds for the revocation of liquor licenses and the regulations prescribed additional grounds. The Court held that the regulations were valid because the Commission had a broad grant of powers: it was to promulgate all regulations necessary to enforce the provision of the act and to ensure proper, safe and orderly conduct in establishments with liquor permits.

The application of these standards to section 602(f) of the proposed regulations is not absolutely clear, but the provision is most likely valid. Section 2(e) of Public Act 73-665 is addressed to the provision of an administrative hearing and provides that:

"If a hearing is requested then, after a hearing and upon a finding that a violation has occurred, the Commissioner may issue a final order assessing a civil penalty under this section which is not greater than the penalty stated in the notice.

Section 2(f) relates to judicial appeals and states that:

"The final order of the Commissioner assessing a civil penalty shall be subject to appeal (in the Superior Court)."

Section 602(f) of the proposed regulations merely allows for the Commissioner or hearing officer to delay specific determinations if insufficient information is not available, but will later become available. There is no direct conflict with the statute because an administrative hearing is allowed, and the issue of whether a violation has occurred is fully litigated as required by the statute, but some part of the penalty is not reviewed until a later date. Section 2(f) is not in conflict because the final order is appealable to the Superior Court, to the extent that it is final. There is, of course, a legitimate argument that the scheme proposed in section 602(f) is not "in harmony" with the overall intent of the statute: to provide a hearing and appeal of the complete notice of violation as it is issued pursuant to Section 2(d) of the Act. The response to this is that no direct conflict exists, the hearing scheme is ancillary to a much larger plan for the implementation of the Act, and the overall plan is a reasonable application of administrative expertise and discretion. (See memorandum relating to the cost of compliance as the basis for civil penalties regs.) Furthermore, it is the responsibility of the hearing officer to present a complete and detailed record of findings,and delays needed to develop this record are rarely overruled. See Sections 12 and 15 of the Connecticut Administrative Procedure Act re the necessary findings of fact to be made by a hearing officer. See also, generally, Davis, Administrative Law Treatise, §16. 02 and §8.08.

In sum, the answers are not clear-cut, but the hearing process called for in Public Act 73-665 is probably adequately implemented by Section 602(f) of the proposed regulations.

III. Does Section 602(f) Deny Due Process?

A separate issue is whether the delay caused by section 602(f) is violative of due process requirements and the Administrative Procedure Act. Section 12 of the Connecticut A.P.A. requires a hearing for contested cases, but the delay element is not addressed. There is no reason to believe that the A.P.A. standard and the due process standard with respect to allowable delay will differ.

In Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926), the Supreme Court decided that administrative delay of two years in a case concerning a proposed rate increase was violative of due process. In American Broadcasting Co. v. F.C.C., 191 F. 2d 492 (D.C. Cir. 1951), a delay of ten years of a hearing for a permanent permit for operation after a temporary permit had been granted was rejected by the Court as a denial of due process. See also F.P.C. v Hunt, 376 U.S. 515 (1964). Compare F.T.C. v J. Weingarten, Inc., 336 F. 2d 687 (5th Cir. 1964), cert. den. 380 U.S. 908 (1965), where the Court found that a complaint pending before a Hearing Examiner for 2 1/2 years not necessarily unreasonably tardy. Generally, however, the hearing officer in an administrative hearing has discretion to grant or deny continuances with due process being violated only in extreme cases, like those above. Certainly a provision for delay, of itself, is not a due process violation, although an egregious application of such a provision may be untenable. An examiner's excercise of discretion is set aside only for gross abuse. See Swift & Co. v. N.L.R.B., 106 F. 2d 87 (10th Cir. 1939); N.L.R.B. v. Algoma Plywood & Veneer Co., 121 F. 2d 602 (7th Cir. 1941).

It is useful and revealing to note that Section 5(a) of the federal A.P.A. provides that "in fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties . . . " This includes the agency party as well as the private party. See Sen. Doc. No. 248, 79th Cong., 2d Sess., 203 (1946). Thus, it is not violative of due process for the administrative agency or its representative to seek delay if it does not unreasonably inconvenience the opponent party and it serves a legitimate regulatory purpose.

The conclusion, then, must be that the provision for delay alone, so long as it is reasonable in the context of the relative convenience of the parties and the legitimate administrative scheme and purposes, is not violative of due process. One should be aware, however, that the due process issue is one chich is laden with personal judgments and notions of equity, and that a court could easily decide that the idea of delay at the request of the complainant agency, or at least for its benefit, while the defendant party remains unable to determine the extent of its liability, is offensive to its conception of fairness and the judicial or quasi-judicial process.

IV. Conclusions

The scheme set forth in proposed regulation 602(f) is not without its difficulties. It definitely alters the familiar conceptions one has, and which the General Assembly may have had, of a unified and simple hearing and appeal process. On the other hand, it is part and parcel of a total regulatory scheme that is clearly within the authority and power of the administrative agency, and does not directly conflict with any provision in the statute. The balancing process is difficult, but the issues are so closely balanced that it is acceptable to attempt to implement §602(f), which eases and reinforces the plan chosen by the Department, and to leave the legal determination to the courts, where it rightfully belongs.

The due process issue is similar: arguments pro and con are available and are sensible, but the instant provision is by no means outrageous, is, in fact, likely to be acceptable on its face, and is subject to objections only after actually applied unfairly. Thus, it is best here as well to leave the determination of this sensitive and highly judicial issue to the courts.

11/7/74
AW/mp

WATER COMPLIANCE: PERMIT LIABILITY

This series of memos addresses the issue of pre-existent permit liability for sources who commenced discharging waste waters prior to May 1, 1967.

The FWPCA requires that every source in a participating state be liable for operating without a permit. With respect to pre-1967 discharges in Connecticut, however, this liability is indirect. A pre-1967 source who is polluting or threatens to do so may be issued an order, upon compliance with which he may be required to obtain a permit. But until all this occurs, the source is free from liability for operating without a permit.

Once such a source has been issued a permit, however, and the permit expires, he may become liable. At this point in the regulatory process, any reason for differentiating between pre- and post-1967 discharges has evaporated. Moreover, several affirmative arguments supporting liability can be advanced:

(1) The nature of a permit is permission to perform an act that would otherwise be illegal.

(2) The Connecticut statutes were designed to conform to the FWPCA, which contemplates continuing permit liability.

(3) Continuing liability is not an unreasonable burden for the regulatee, since the system allows him ample time to institute improvements necessary for conformity with changing standards.

(4) If the NPDES permit carries with it no liability for violation (failure to renew is a violation), it is a meaningless document.

(5) The other Connecticut water pollution statutes are consistent with this interpretation.

But since this liability is not explicitly mentioned in the state Clean Water Act, an amendment to the statute is suggested.

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To	NAME Phil Reed	TITLE	DATE June 10, 1975
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From	NAME Fred Dennehy	TITLE	TELEPHONE
	AGENCY	ADDRESS	

SUBJECT

Preexistent Permit Liability for Pre-1967 Polluters

Dilatory litigation could emerge as a major problem in the early stages of CA implementation. The potential consequences of violating an order from Water Compliance may induce a recalcitrant regulatee to postpone the effective date of the order through unnecessary hearing requests and unreasonable appeals. The incidence of such tactical delays is likely to decline if the Department has the discretion to impose an assessment for a preexistent violation of some kind. Air Compliance has this discretion with respect to penalties for previous violations of emissions standards, but since it is not presently illegal to discharge water in excess of current standards, Water Compliance does not. An alternative basis for liability may exist, however, if the regulatee has been operating without a permit. This memo examines that possibility.

Section 25-54i of the General Statutes makes it illegal to "initiate, create or originate any new discharge" after May 1, 1967 without a permit. Any post-1967 polluter without a permit is subject to a civil assessment.

A pre-1967 polluter responsible for a continuing or recurring discharge is nonetheless subject to an abatement order (25-h), one of the conditions of which may be the procurement of a permit. It is possible, but by no means certain, that such a person would be liable at any time in the future for operating without a permit.

There is an argument, albeit tenuous, that even a pre-1967 polluter who has never come under a departmental order may be subject to liability for operating without a permit. This argument assumes that Connecticut, by virtue of its participation in the NPDES program, has been made the agent of the Federal Government for purposes of enforcing FWPCA throughout the state. If this is true, then Connecticut is empowered by 40 CFR 124.73 (a)(3) to impose civil penalties for discharging without a permit, and conceivably, under 40 CFR 124.73 (a)(1), to enforce the national effluent standards in the same manner.

It is doubtful, however, that the FWPCA contemplates a single permit system administered uniformly by the several states. While the legislative history of P.L. 92-500 does not address the issue directly, its language suggests that a variety of state programs might qualify to issue, modify and revoke the NPDES permit. "Any State," according to the history, "may create its own ★ permit system, following Section 304 guidelines. The Administrator shall approve the State permit program and delegate authority to the State, unless

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the State program fails to have adequate authority to carry out several specified functions." (p.3736). The "authority" delegated appearsto be control rather than agency.

It is also stated that "the Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with *programs* which meet the requirements of this act." (p.3737, my italics.) And even those portions of the history which stress conformity allow for a plurality of approaches, urging uniformity "in as many procedural requirements *as possible*." (p.3720, my italics.)

Even if the FWPCA is read to intend a delegation of total agency to the States, the Connecticut statute must be read the same way if the argument for preexistent permit liability is to stand. 40 CFR 124.10 says that any state participating in the NPDES must have "a statute or regulation, enforceable in the State courts, which prohibits discharges of pollutants by any person, except as authorized pursuant to an NPDES permit." Arguably, 25-54c(k), which grants the commissioner the right "to exercise all incidental powers necessary to carry out the purposes of ... the federal water pollution control act," in conjunction with the general prohibition against pollution contained in 25-54(f), is designed to meet that requirement. And since neither 40 CFR 124.10 nor 25-54c(k) is specifically limited, the permit requirement applies to all discharges, post-1967 and pre-1967, whether under orders or not.

It is evident that this interpretation is extremely strained, and there are several arguments to the contrary. First, the hermeneutic principle of *inclusio unius, exclusio alterius* as applied to 25-54i(a) strongly implies that pre-1967 polluters are not required to obtain a permit; if the obligation is indeed general, the first sentence is both unnecessary and misleading. Nor is 25-54c(k), with its grant of "incidental" powers, sufficiently clear to function as a tacit amendment to 25-54i(a).

Second, the Connecticut Attorney General, in his recitation of authority for NPDES qualification in May, 1973, plainly ties the issuance of a permit to a pre-1967 polluter to the prior issuance of an abatement order. The Attorney General's statement was the major basis for EPA's designation of Connecticut as a participant in the NPDES program in September, 1973.

Third, Directive 5, Manual Code 3325 of the Department, dated August 3, 1973, adopts the procedure of discretionary NPDES permit issuance to a pre-1967 polluter upon his compliance with an order. This procedure assumes the lack of a preexistent obligation. Such a Directive, according to the Attorney General's statement, could be enforced against the Department.

Finally, it has been the consistent practice of the Department to require a permit for a pre-1967 discharger only after an order has been issued to him. To summarily alter this practice without promulgating a regulation to that effect would subject the Department to the charge of due process violation.

The primary difficulty in the argument against preexistent permit liability revolves around 40 CFR 124.10. But it appears that EPA considered the order-permit procedure sufficient to meet its requirements. If there is an inconsistency here, it is a Federal one. The argument that Connecticut intended to impose a preexistent permit liability on pre-1967 polluters is too weak to stand.

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From	NAME Fred Dennehy	TITLE	TELEPHONE
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SUBJECT FURTHER QUESTIONS REGARDING LIABILITY OF PRE-1967 POLLUTERS

I. As reported in a previous memo, it appears that there is no preexistent liability for a pre-1967 polluter who has not come under an order and who is discharging without a permit. The situation may be different, however, for a pre-1967 polluter who has come under order, complied with the order, been issued an NPDES permit and failed to obtain a renewal upon expiration. 25-541(e) of the General Statutes states that when a violator has complied with an abatement order, the Commissioner "may issue a permit which shall thereafter be deemed equivalent to a permit issued under subsection (b) of section 25-541, provided a public hearing shall not be required prior to issuing such permit unless required by the Federal Water Pollution Control Act." Since the hearing proviso is the only limitation on its equivalence, such a permit falls under the auspices of subsection i(c) as a permit "issued pursuant to this section." Therefore, it "may be renewable for periods not to exceed five years each, in accordance with procedures and requirements established by the Commissioner, "(25-541(c)(3)) and "shall be subject to such other requirements and restrictions as the Commissioner deems necessary to comply fully with the purposes of this chapter and the Federal Water Pollution Control Act." (25-541(c)(4)).

25-541(c)(3) employs the discretionary "may" rather than the mandatory "shall." It appears that this discretion must be vested solely in the Department, since there is little reason for a source to exercise a permit option absent an attendant obligation of some kind. The Department's discretion is then:

(1) Exercisable in terms of the applicable renewal period. According to Bob Taylor's comments in the 1973 hearings, the language "not to exceed" was added primarily for administrative convenience; if a single company, for instance, has permits for several discharges originating at different times, the Department has the power to establish a uniform expiration date. The Department may also use this provision to make Connecticut and NPDES permits concurrent.

(2) Limited by procedures established by the Commissioner. These are contained in Directive 13, Manual Code 3325. This provides, among other things, that the Department shall ensure compliance with a number of points, including "any additions to, or revisions or modifications of (applicable) effluent standards and limitations, water quality standards, or other legally applicable requirements during the term of the permit." It also requires anyone wishing to continue to discharge beyond the term of an NPDES permit to apply for reissuance at least 180 days prior to the expiration date.

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There is, however, no specific penalty mandated for discharging after the expiration date. Presumably, failure to apply would render a source subject to a moderate CA based on a procedural violation of permit and/or order. But post-expiration discharging in violation of standards (following either lapse or denial) might render the source liable only to another abatement order, upon compliance with which a new state permit would issue, recapitulating the procedure which initially brought him under the aegis of NPDES. There would thus be no liability between the expiration date and the date of the new final order which the Department could use as leverage against dilatory litigation. While the spectacle of an endless series of five year plans might seem unduly cumbersome, it is arguably the most literal integration of i(c)(3) and i(e) with the rest of Connecticut statute, which is silent as to pre-1967 permit obligation. The Connecticut courts opt for literal interpretation whenever possible.

25-54i(c)(4), however, provides a stronger argument for liability. It was amended in 1973 for the express purpose of complying with the FWPCA, and the language specifies compliance not only with the literal wording but with the purposes of the act. Thus the NPDES General Conditions, which the Department regularly attaches to orders and permits, should be read in the light of the entire federal act.

> Condition 11 states:
>
> Any recipient of an order or permit who wishes to continue to discharge water, substance or material to the waters of the State of Connecticut after the expiration date of the order or permit shall file for a reissuance of the order or permit on a form prescribed by the Director which shall include a complete NPDES application no less than 180 days in advance of the date of expiration.

The language of Condition 11 is substantially the same as that contained in 40 CFR 124.52 (Reissuance of NPDES permits), except that it substitutes "order or permit" for "permit." The purpose is assuredly to bring Connecticut reissuance procedures in line with those contained in the federal regulations.

The federal regulations do provide liability for post-expiration discharges. 40 CFR 124.52 does not set forth a specific penalty because to do so would be redundant; 40 CFR 124.10 (states to have laws prohibiting discharge without a permit) and 40 CFR 124.73 (authorizing civil penalties and other remedies) are sufficient.

It is true that Connecticut does not meet the literal language of 40 CFR 124.10 with respect to pre-1967 polluters who have not come under order. But the reasons making the order-compliance-permit process acceptable for the initial Department-source contact are not applicable to the reissuance situation. The dichotomy between pre-1967 and post-1967 polluters was originally conceived as an act of grace. In the words of the Attorney General's Statement, sections 25-54g, 25-54h, 25-54j, and 25-54k of the General Statutes "were designed to provide a time schedule for the abatement of sources of pollution existing prior to May 1, 1967, or to provide a time schedule to abate potential sources of pollution previously approved but no longer satisfactorily operating pollution abatement facilities.... The sources of pollution in Sections 25-54g, 25-54h, 25-54j and 25-54k were allowed to continue as long as the alleged polluter acted within the framework of a time schedule for the abatement of pollution." Once a pre-1967 source has been issued an order, the time schedule is broken and any reason for preferential treatment evaporates. When the NPDES permit issued pursuant to 25-54i(e) expires, any further differentiation between pre and post-1967 polluters is groundless.

Nor are the other arguments for initial non-liability applicable:

(1) The implicit exclusion of 25-541(a) refers to initial obtainment, not renewal.

(2) The Attorney General's Statement does not argue for post-expiration non-liability, and in fact, as discussed, suggests the opposite.

(3) Directive 13, though silent on liability, is tailored to federal practice.

(4) Connecticut practice has not been inconsistent with post-expiration liability.

It appears, then, that with 25-541(c)(4) as the key to the federal act, a pre-1967 polluter who has come under order and received a permit is thereafter liable for operating without a permit. I think that the authority for this interpretation, while indirect, is unambiguous. If the courts should find it ambiguous, however, any further tests are likely to be decided in the Department's favor.

The language and purpose of the FWPCA clearly favor an uninterrupted legal obligation to maintain increasingly effective pollution control facilities. The Attorney General's statement makes it clear that Connecticut law is committed to the same purpose:

> With reference to the goals to be accomplished under the federal act of 1977 and 1983, we are of the opinion that the Connecticut statutes are sufficient to authorize not only compliance with federal requirements as they may become more stringent, but to keep pace with the mandate of the Connecticut legislature, the elimination of pollution through technological advance.

This mandate could hardly be fulfilled if liability were allowed to lapse periodically. Indeed, under the "bizarre result rule" said in United Aircraft v. Fusari, 163 Conn. 401, 311 A 2d 63 (1972) to be applicable in ambiguous cases, the Department could argue that in the absence of supporting literal language, an interpretation which allows a limitless series of litigative delays for no apparent reason is untenable.

There is nothing directly to the point in the legislative history of 25-541(e), but the peripheral commentary is marginally favorable. The announced purpose of the 1973 amendments was integration with the federal law, and one of the benefits to be derived from subsection (3), according to the testimony of Bob Taylor, was a shifting of the administrative burden from Department to source, something that could hardly be accomplished through intermittent issuance of orders:

> When an order is issued there is no 5 year term attached to the compliance with an order and it is the state's obligation to reconsider on some schedule that isn't specified. The Federal Law requires that that schedule would be no more than 5 years and this really transfers the obligation for reconsideration of the permit away from a state initiation to an applicant initiation and allows us a means to insure that those orders that are issued and complied with really should be adequate to receive a permit.

Finally, common law treatment of licenses and permits tends to assume that "the purpose of a license is to make lawful what would be unlawful without it." State v. Minneapolis-St. Paul Metropolitan Airports Commission, 25 NW 2d 718, 725. The implication is that while a permit creates a privilege for a stated term, it also creates a contingent liability upon expiration if one did not exist before.

II. If 25-54i(c)(4) provides continuing future liability for pre-1967 polluters who have come under order, it is unnecessary to ask whether 25-54i(e) brings them under the provisions of i(a). And if i(c)(4) is insufficient, the i(e) → i(a) argument will almost certainly fail. 25-54i(a) may be seen as an entrance way to i(b) and what follows from i(b). 25-54i(e) is merely an alternate entrance way; it does intersect with the former. And even if the i(e) → i(a) transformation can be inferred, renewal status is still subject to i(c)(3) and (4).

Furthermore, 25-54i(a) is badly drafted, and may create a renewal loophole that can only be countered by i(c)(4). Literally, i(a) states only that no person after 1967 shall "initiate, create or originate any new discharge of water." Renewals do not apply to new discharges and therefore are not covered by this section. All renewals, pre and post-1967, devolve upon i(c), and any "bizarre result" argument advanced for a broad interpretation of i(a) would be no stronger than that advanced supra for i(c)(4).

III. Preexistent liability can probably be established for all post-1967 polluters and pre-1967 polluters who have come under order without any changes in statute or regulation.

In order to reach pre-1967 polluters who have not come under an order, the Department would do best to secure a statutory amendment abolishing the distinctions between pre and post-1967 dischargers contained in 25-54h, i and j. General permit regulations passed pursuant to the generally prohibitive 25-54f and the "incidental" clause 25-54c(k) would still be inconsistent with the only possible intent of i(a). However, the federal standards could probably be adopted as regulations pursuant to 25-54f and 25-54c(k), and thus create a non-permit liability for pre-1967 polluters.

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From	NAME Fred	TITLE	TELEPHONE
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SUBJECT

PERMIT LIABILITY OF PRE-1967 POLLUTERS

I tried to make the best argument I could for liability for operating without a permit for pre-1967 sources as things stand now. As you will see, it's anything but airtight; therefore, I think a change in the regs, if not the statute, is warranted. If that isn't feasible, though, I think an argument along these general lines would stand a fair (but only fair) chance of convincing the courts.

It appears that once a pre-1967 discharger has been issued an NPDES permit, he is liable to a CA thereafter for discharging without one. The following factos urge this conclusion:

1. The nature of a permit.
2. The purposes of the federal act, to which the 1973 amendments to the Connecticut statutes are designed to conform.
3. The reasonableness, for both the Department and the regulatee, of continuing liability.
4. The bizarre implications of the contrary conclusion.
5. The fact that the Connecticut statutes are consistent with this interpretation.

The Nature of a Permit

For regulatory purposes, the terms "license" and "permit" are synonymous. Parsons v. People, 76 P. 666, 669 (1904); Standard Oil v. State Board of Equalization, 99 P. 2d 229, 234 (1940). The Connecticut courts have not specifically defined either, but the standard common law definition, incorporated in numerous state courts opinions, is found in 53 C.J. Licenses, section 1:

> The term "license" is not involved in uncertainty or doubt; in its general and popular sense, as used with reference to occupations and privileges, it means a right or permission granted by some competent authority to do an act which, without such license, would be illegal.

*

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Thus, a permit confers a right which imples a "no right" or legal liability in its absence. And this right is strictly temporary:

> A license confers upon the licensee the right to engage in the licensed business only for the term specified in the license. A prior expired license is functus officio and confers no rights upon the licensee therein, except in certain cases whereby statute it entitles him to a renewal upon compliance with specified conditions.
>
> State ex. rel. Interstate
> Airparts v. Minneapolis
> - St. Paul M. A. Comm.,
> 25 N.W. 2d 718, 725 (1947)

Expiration institutes the condition of legal liability which would have existed previously but for the permit.

In Connecticut, a pre-1967 discharger has no permit liability until he causes or threatens to cause pollution and is issued an order to abate or correct. Once the discharger has complied, the Commissioner in his discretion may choose to further define the discharger's obligations by means of an NPDES permit. If a five year obligation were all that were contemplated, there would be no reason for using two mechanisms instead of a single long-term order. The use of a permit can only be explained as a means of imposing continuous potential liability.

Purposes of the Federal Act

The language of the 1973 amendments specifies compliance with the purposes of the federal act, and the federal act makes it illegal, not merely remediable by means of an order, to discharge after the expiration of a permit, (40 CFR 124.51, 124.52 and 124.10). It is true that Connecticut does not meet the literal requirements of 40 CFR 124.10 with respect to pre-1967 dischargers who have not come under order, but the reasons making the order-compliance-permit process acceptable for the initial Department-source contact are not applicable to the reissuance situation. Under 25-54i, sources already in existence were accorded the benefit of not having to go through the process of obtaining a permit for a simple discharge. Once their discharges caused or threatened to cause pollution, however, and they were issued an order, there would be no more reason for preferential treatment. Indeed, 25-54i(e) specifically removed any benefit for a pre-1967 polluter or pollution threatener by providing that he could be issued a permit "thereafter deemed equivalent to a permit issued under subsection (b) of section 25-54i."

If he is considered under subsection (b), he is subject to the renewal provisions of subsection (c). Subsection (c) either provides him with renewal liability by implication or it does not. If it does not for the pre-1967 source but does for the post-1967 source, then the Connecticut statutes contain a grandfather clause forbidden in the comment to 40 CFR 124.10 and denied by the Attorney General. If it does not provide renewal liability for either category of source, it countermands the purposes of the federal act expressed in 40 CFR 124.51, 124.52 and 124.10. If it does provide for renewal liability, there is no conflict.

Reasonableness

Continuing permittee liability is a far more reasonable administrative tool for the Department than intermittent susceptibility of the regulatee to an order. It shifts the major burden of reconsideration to the source, and lessens the probability that there will be long periods of substandard performance.

Nor is it at all unreasonable from the point of view of the source faced with stiffening effluent standards. New federal standards are typically announced far in advance of their effective dates in order to give the source time to comply. Moreover, since his permit requires the source to apply for renewal at least 180 days before expirations, he has ample notice and time to at least commence compliance with new standards. Finally, 40 CFR 124.44 allows the Department to attach a lenient schedule of compliance to the new permit. Although an ordinary state permit is not issued with installation, an NPDES permit is not subject to this restriction.

Bizarre Implications of the Contrary

If the issuance of an NPDES permit carries with it no attendant liability, what effect does it have? If a source violates its terms, it can be taken away. If it is taken away, the source is operating without a permit, but since he is not required to have one and he has (necessarily) already complied with the Department's order, he is legally no worse off. Thus the NPDES permit is reduced to a kind of recallable certificate of merit for complying with an order.

If, on the other hand, the issuance of an NPDES permit does carry liability, there is no reason to assume, in the absence of specific language to the contrary, that the liability differs from that associated with all other NPDES permits (and permits in general) in that it terminates after five years.

Consistency with Other Conn. Provisions

This interpretation does not contradict or render useless any other statute. 25-54h, together with 25-54i(e), is designed to bring a pre-1967 polluter (eventually) under the NPDES system.

25-54k, together with 25-54i(e), is complementary; it enables the Department to bring a previously untouched pre-1967 source who has not polluted yet, but who (in the face of new standards, perhaps) probably will in the future, under the NPDES system. 25-54j insures that the Department is not limited by its own orders or permits. If circumstances dictate (for instance if water quality standards are threatened) the Department can unilaterally modify a permit or order before its termination date. Such a modification order would of course include a time schedule.

Finally, since the AG keeps stressing the equivalence of an order and an NPDES permit, it is perhaps legitimate to think of an NPDES permit as a continuing order, the violation of which (non-renewal) is subject to a CA.

O&M REQUIREMENTS: SCOPE OF REVIEW

O & M standards may be required in regulations or orders or may be used as elements of proof in establishing an emissions violation.

The standard of review for administrative regulations is narrow. The chief danger is that a court will find that the correlation between O&M requirements and emissions levels is so tenuous that such regulations are not necessary for carrying out the Commissioner's duties. This is technically a question of law rather than of fact. In practice, however, (1) the courts may be willing to defer to agency expertise in this regard and (2) correlations are likely to be high. The second danger is a constitutional one -- that the courts will find the definition of "controlled source" to be overly narrow and thus a violation of equal protection. However, a reasonable showing of administrative convenience is an adequate defense to this objection.

The standard of review for orders is somewhat broader. The major concern, that the courts will find the "order" a disguised regulation, is treated in a separate memo. The second concern is that the hearing officer might restrict admissible evidence in such a way as to offend the spirit of the APA. Other grounds for reversal of course exist, but these are minimized due to the deference accorded to remedial and health-related regulations by the Connecticut courts.

O&M parameter data may provide circumstantial evidence for the proof of an emissions violation. In Connecticut this is the equivalent of direct evidence. However, it may not be possible to use evidence of a single O&M failure to prove a continuous emissions violation. The Department may circumvent this limitation if it can persuade the courts to adopt the Wigmore-McCormick view that the burden of proof should fall upon the party possessing "peculiar knowledge of the facts."

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SUBJECT

SCOPE OF REVIEW: O&M

I. Judicial Review of O&M Requirements Embodied in Regulations

If O&M requirements are embodied in regulations, they may be challenged in a declaratory judgment proceeding or in an appeal from a decision that applies them to a specific source or group of sources. If a source elects the declaratory judgment route, he must first request the Department to pass upon the validity or applicability of the regulation pursuant to its declaratory ruling authority §§4-175 and 4-176). If the Department refuses, or if it renders a ruling unfavorable to the source, the source may then institute a declaratory judgment proceeding in the Court of Common Pleas for Hartford County. If, on the other hand, a source bases his appeal upon an unfavorable adjudication, the rule upon which the decision is based is nonetheless reviewable by the Court of Common Pleas in his home county pursuant to §4-183.

Whichever route is chosen, the scope of review is relatively narrow. Since the legislature has delegated the Department the power to adopt regulations (section 22a-6(1)), any regulation embodying O&M requirements would be classed as a "legislative" rather than an "interpretative" rule. It would not therefore be open to the question of whether it had correctly interpreted the parent statute or whether it amounted to an attempt to exercise legislative power which had not been delegated. It could, however, be attacked on the following grounds:

1. that it does not reasonably relate to the subject matter on which power to legislate has been delegated;

2. that it does not conform to standards prescribed in the enabling statute;

3. that it is invalid on constitutional grounds.

Cooper claims that the courts currently (1965) pass upon the validity of administrative rules in light of five commonly announced "tests." He stresses that these criteria are not talismanic, that they are frequently little more than the formal habiliment for a policy decision on the assessment of an agency's overall repute. Moreover, the tests

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overlap considerably. Still, they provide perhaps the best available scheme for analyzing the scope of judicial review of regulations. They are:

A. A rule is invalid if it exceeds the authority conferred.

B. A rule is invalid if it conflicts with the governing statute.

C. A rule is void if it extends or modifies the statute.

D. A rule having no reasonable relationship to statutory purpose is void.

E. A rule deemed to be unconstitutional or arbitrary or unreasonable will be set aside by the courts.

A. EXCESS

The presumption of validity generally accorded to a legislative rule is not absolute, but contingent. The presumption exists if and only if the rule comes within the scope of delegated authority, and the initial determination of this is for the courts. In the New Jersey case *In re Weston*, the court declared that "unless [the regulations] are clearly *ultra vires* on their face, the person attacking them has the burden of proving otherwise," 176 A. 2d 479 (1961). But the *ultra vires* classification does not have to be demonstrated or even asserted by the opportion. Thus, if the delegated rule-making power is contingent upon the fulfillment of certain conditions, a court can take it upon itself to determine whether those conditions have been fulfilled.

If the Department's O&M regulations are issued pursuant to §22a-6, or if 22a-6 is held controlling in the issuance of any Departmental regulation despite its nominal parent, a Connecticut court might declare them invalid on the grounds that they are not "necessary" (22a-6(1)) for the carrying out of his function, powers and duties. Obviously, a court is much more likely to make this determination if it is convinced that the requirements do not correlate with the emissions they are supposed to control.

Similarly, since 22a-6(1) delegates the power to adopt regulations "necessary and proper to carry out [the Commissioner's] functions, powers and duties," a Connecticut court could hold that the delineation of those powers and duties in §22a-5 is either too vague generally or sufficiently specific in other respects that it implicitly excludes the matter of operation and maintenance. Again, a court is much more likely to react this way if it sees an insufficient correlation between the requirements and emissions. And again, since the issue is *ultra vires*, the insufficiency relates to a matter of law rather than fact, so the determination is not one within the area of agency expertise.

Courts will invalidate a rule under this test by interpreting the general terms of a statute as being implicitly limited by legislative intent. In McKibben v. Michigan Corporation and Securities Commission, 119 N. W. 2d 557 (1963), the court struck a regulation making it illegal for a broker to refuse to buy or sell a house for reason of race, color or creed. The enabling statute empowered the Commission to adopt regulations prohibiting "unfair dealing," but the court found that while discrimination was "unfair," the legislature had had in mind only specifically economic "unfair dealings," 119 N.W. 2d, at 565.

And in Lewis v. Florida State Board of Health, 143 So. 2d 867 (1962), the Florida Supreme Court held that a regulation governing the use of toxic pesticides on lawns and shrubbery was not a "health" regulation in the sense used in the statute. The court said that

> a statute that is too vague and incomplete as a law in itself cannot be used as a vehicle for an administrative body to proceed to establish adopt and promulgate a code for regulating a particular industry. The tulemaking power of the Board is limited to the making of rules and regulations necessary to the enforcement of the Act. It is incumbent upon an agency relying on an act as authority for its regulations to prescribe only such regulations as come within the specifications laid down 143 So. 2d, at 877.

The court also quoted favorably from an earlier decision in Phillips Petroleum Co. v. Anderson, 74 So. 2d 544 (1954):

> Whenever regulations are to be imposed in order to promote health, welfare, safety and morals, it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency, 74 So. 2d, at 547.

It is important to keep in mind, however, that the thrust of this statement runs counter to the predominant policy of the Connecticut courts, which have generally relaxed their scrutiny of vague statutory provisions when the subject matter deals with health or safety or when particularly complex economic or administrative conditions are present. See State v. Vachor, 140 Conn. 478 (1953); Forest Construction Co. v Planning and Zoning Comm., 236 A.2d 917 (1967); Aunt Hack Ridge Estates v. Planning Comm., 160 Conn. 109 (1970).

B. CONFLICT

A court will overrule on this test when there is wording in the regulation that contradicts the wording of the governing statute or runs counter to its overruling purpose. Instances of blatant contradiction are very rare, but a conflict in purpose can occur whenever a regulation imposes any limitations on the implementation of legislative policy. In Teachers Retirement System v. Duckworth, 260 S.W. 2d 632 (1953), aff'd 264 S. W. 2d 98 (1954), the Texas Court of Civil Appeals found that a rule refusing to provide apportioned payments for the month during which a teacher had died conflicted with the overall purpose of "providing support for teachers after their teaching days are over." The rule was void although it had prevailed unchallenged for years. In the case of the Department's O&M regulations, however, the conflict test seems out of the question, since there is nothing in the statutes that could be contradicted or limited by precise standards.

C. EXTREMES

A court will invalidate a regulation if it feels that it gives effect to a policy that extends the one set forth in the governing statute. In Stone v. Harris, 95 N.W. 2d 765 (1959), the Wisconsin Supreme Court set aside a rule by the Board of Examiners in Optometry classifying certain advertising practices as "unprofessional conduct." Though the statute prohibited unprofessional conduct in one section, it had another covering prohibited advertising, in which the practices forbidden by the rules were not included. The court said that the inference was "clear that if the legislature had intended to prohibit the type of advertising covered by the rules of the board it would have so stated in [the proper section]," 95 N.W. 2d, at 766. And in Livestock State Bank v. State Banking Commission, 127 N.W. 2d 139 (1964), the South Dakota Supreme Court declared invalid a rule by the Banking Commission restricting the location of branch offices and branch banks. The statute authorized the State Banking Commission "to adopt all necessary rules and regulations not inconsistent with the laws of this state for the management and administration of banks doing business under the laws of this state." Despite the breadth of this wording, the court found "nothing therein indicating that the legislature contemplated that the rules to be adopted by the Commission for 'the management and administration of banks' should extend beyond the area of bank operation as contrasted to bank location," 127 N.W. 2d, at 141.

It would be possible for a Connecticut court to find that the O&M regulations extend the purpose of the statute for reasons similar to those which could be used in establishing an excess of authority. But again the history of the Connecticut Supreme Court's decisions in this area strongly suggests that it will not. The only case of which I am aware in which a regulation was invalidated on this test is Avonside, Inc. v. Zoning and Planning Comm. of Avon, 215 A.2d 409 (1965). There the board had passed a regulation requiring that a developer pay a stated percentage of the cost of constructing streets, when the only statute remotely relating thereto empowered the board to accept a bond in lieu of demanding actual completion of improvements before final approval. Since the board's action was wholly removed from its authorization, the court had no choice. But in debatable areas "the meaning of a statute or regulation...should be construed, if it reasonably can be done, so as to make it valid," Citerella v. United Illuminating, 158 Conn. 600, 608 (1969). See also Carillo v. Pension Comm. 154 Conn. 1, 8 (1965).

D. NO REASONABLE RELATION

This test appears to be a hybrid between excess of authority and unconstitutionality and will be considered under the general discussion of the next topic.

E, UNCONSTITUTIONALITY

1. Unreasonable. If the courts are convinced that the correlation between O&M requirements and emissions is non-existent or too remote, they may strike them on the grounds of unreasonableness. The Connecticut Supreme Court has in the past scrutinized zoning ordinances with great care, but has overruled only upon a finding of "no rational relation to public health, safety, welfare and prosperity of the community," Carthouts v. Town of Newington, 140 Conn. 284 (1953). But see Del Buono v. Board of Zoning, 143 Conn. 673 (1956), in which the present unreasonableness, due to changed patterns, of a former residential restriction was held to be a violation of due process.

On balance, there is very little chance for invalidation of this test. If pollution control equipment bears a rational relation to emission levels, the proper use of that equipment does as well. Only if the parameter standards are found to be so stringent that they force the source to operate within a narrow band of an otherwise permissible emissions-producing spectrum is the court yet to find them "unreasonable" in the sense of arbitrary and capricious.

2. Vague. If the requirements are not sufficiently well-defined in the regulations, but await detailed application through the class order device, a court may be disposed to invalidate them on the grounds of unconstitutional vagueness. The Connecticut Supreme Court has used this test on at least two fairly recent occasions in the area of zoning regulation. In Powers v. Common Council, 154 Conn. 156 (1966), the court overturned a regulation stating that "the site plan of such [multiple housing] project shall be subject to the approval of the Planning Commission especially as to traffic access, safety and the adequacy of parking facilities" because of an absence of standards. See also Fox v. Zoning Board of Appeals, 146 Conn. 165 (1959). But, as mentioned repeatedly above, this standards is deliberately relaxed in matters pertaining to health and safety or involving highly complex conditions.

3. Equal Protection. If the courts can be convinced that one of the bases for an O&M classification is unreasonable, it may declare the regulation establishing it to be in violation of equal protection. It appears that the only potential problem for the Department in this respect is the inclusiveness of its definition of "controlled source;" specifically, whether those for whom "other abatement strategies" have been prescribed and those who have complied without an order should be covered. But even if there is a difficulty here, the burden of establishing an equal protection violation is "extremely formidable." Even if a distinction appears to have little rational basis from an absolute, it must be recognized that the legislature or an agency acting in a legislative capacity may "limit its action upon a decision to proceed cautiously, step by step, or because of political exigencies, including administrative conveneience and expense." N.J. Restaurant Ass'n v. Holdeman, 131 A. 2d 773, 776 (1957).

4. Self-Incrimination. The coexistence of reporting requirements and specific parameter standards may raise the question of self-incrimination under the Fifth Amendment. As previous memos have demonstrated, this is unlikely and in any case of limited concern, since the privilege does not apply to corporations.

II. Judicial Review of O&M Requirements Embodied in an Order

Section 4-183(g) of the General Statutes specifies six possible grounds for the reversal of an administrative decision in a contested case:

1. in violation of constitutional or statutory provisions;
2. in excess of the statutory authority of the agency;
3. made upon unlawful procedure;
4. affected by other error of law;
5. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
6. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The first two issues have been considered in the previous section concerning review of regulations, and those considerations are generally applicable here. The other four issues will be considered successively.

A. UNLAWFUL PROCEDURE

If the Department issues a class-wide order pursuant to regulations of general scope, it is possible that a reviewing court may find that the requirements should have been promulgated via the rulemaking process. This question has been addressed in a previous memo; it remains the primary area of concern.

If the Department fails to consider a matter which the reviewing court feels it should have considered, or excludes evidence which the court regards as relevant, its decision may be subject to reversal. There are countless cases resulting in remand on these bases, and in most instances the decision of impropriety appears to rest upon an ad hoc determination rather than any formulable standards. It would be best for the Department to give on-the-record consideration to every matter received in evidence and to receive in evidence every matter not egregiously repetitious or beside the point.

B. ERROR OF LAW

The courts will review questions of law, but not questions of basic fact. Thus, they will determine whether the Department has correctly interpreted and applied the substantive provisions of the statutes and regulations, but they will, in nearly every instance, permit its judgment on evidentiary matters, such as the capability of a particular piece of equipment, to stand.

Between the direct question of law and the basic question of fact is the inference of "ultimate fact." Ultimate facts are usually phrased directly from the applicable statute or regulation and may include language such as "reasonable," "fit, " "job-related," "in the public interest," or "necessary under the circumstances." Traditionally, the reasonableness of the inference from basic fact to ultimate fact is itself a question of law and therefore the province of the courts.

Cooper claims that state courts have on the whole been much more willing than the federal courts to examine the reasonableness of such inferences. And the criteria urging reviewability are likely to be other than a largely artificial discrimination between the universe of fact and the universe of law. Policy considerations and general agency repute play an important role; perhaps most important is the court's assessments of its overall qualifications vis-a-vis the agency's. Connecticut courts will review the reasonableness of an inference, but their willingness has been evidenced almost exclusively in cases of a non-technical nature.

In a number of cases involving the Administrator of the Unemployment Compensation Act during the mid-nineteen fifties, Connecticut courts have found the following ultimate facts to be within their purview: "adjustment for overcompensation," Allen Mfg. Co. v. Administrator, 139 Conn. 402; "payment by way of compensation for loss of wages," Brannigan v. Administrator, 142 Conn.160. 1955 Only one case (Brannigan) entailed an agency reversal.

In two mid-fifties cases involving town ordinances, the courts reviewed the ultimate facts "package store" and "street." Danbury v. Corbett, 139 Conn. 379; Park Construction Co. v. Greenwich Planning and Zoning Board, 142 Conn. 30 (1955). The latter entailed the reversal of the board's determination upon a contrary judgment of statutory intent. But in New Canaan County School v. Town of New Canaan, 84 A. 2d 691 (1951), the Connecticut Supreme Court reversed a judgment of the Court of Common Pleas reversing the town's refusal to exempt from taxation the living quarters of certain teachers. The ultimate fact in question here was "exclusively for educational purposes."

But with respect to technical questions and matters involving licensure, the Connecticut pattern has been one of judicial self-restraint. Typical of this trend is the recent case of Blesso v. Board of Plumbing and Piping Examiners, 310 A. 2d 136(1973), in which the Hartford Court of Common Pleas denied an appeal from license suspension, asserting that "the record will not be reviewed to determine whether this court would come to the same conclusion," 310 A.2d, at 137. This course was followed even though §20-336, (concerning plumbers' licenses) provides that "after a hearing de novo said court shall affirm, modify or reverse the action of said board." The court said that only in the qualified sense that it considers all matters relating to the legal propriety of the board's action is the manner of judicial review "de novo."

It appears, then, that the courts will probably not subject any reasonable inference of ultimate fact by the Department to judicial review. It follows, nonetheless, that the fewer the ultimate facts concerning which the courts will feel as competent as the Department, the smaller the probability for reversal. It seems best, therefore, that if the Department chooses to impose class-wide O&M requirements pursuant to a general enabling regulation, that the standards of that regulation be as technical as possible, while allowing specifically for departmental discretion.

C. CLEARLY ERRONEOUS

Under the Revised Model State Act working adopted by Connecticut, there appears to be very little vulnerability for the Department on this issue. Even under the older "substantial evidence" formulation, which was considerably more open to manipulation, the restraint of the Connecticut court was apparent:

> The Commissioner is the trier of the facts and his finding is of the same import as the finding of a trial judge. 'Settling the credit of witnesses; weighing evidence; ascertaining the truth from conflicting testimony or incongruous evidential facts;' -- is 'within the exclusive jurisdiction' of the Commissioner. His finding,

> insofar as it discloses the facts so determined, which we designate subordinate facts, cannot be changed unless the record discloses that the finding includes matters found to be facts without evidence, or fails to include material facts which are admitted or undisputed facts." Marschner v. American Hardware Corp, 141 Conn. 742, 747-48 (1954).

The Connecticut Supreme Court has overturned administrative decisions based upon a lack of "substantial evidence," but in these cases, mostly having to do with labor relations, the evidentiary lack concerned moral or judgmental, rather than empirical facts. In Hoyt-Bedford Co. v. Conn. State Board of Labor Relations, 147 Conn. 142(1960), the Connecticut Supreme Court reversed the board's finding of "unfair labor practices" based in turn upon a finding of "hostility to union activity." In reviewing the rather scanty evidence for this conclusion (as much one of law as of fact) the court said:

> Substantial evidence...is evidence that carries convinction...It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion....It means something more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established," 147 Conn., at 147.

Even under this test, it would be difficult to invalidate straightforward, empirical findings of fact. Under the modern "clearly erroneous" test, it should be next to impossible.

D. ARBITRARY OR CAPRICIOUS

There is nothing inherent in the imposition of O&M requirements to suggest that this will be an issue. It is likely to arise only in the context of inconsistent applications of requirements in different cases in which no legitimate basis for distinction is evident.

SCOPE OF REVIEW: POSTSCRIPT

I. Regulations.

A. Authority

The principal concern here is that a reviewing court will find that the correlation between the department's O&M requirements and emissions levels is so tenuous that such regulations are not necessary for carrying out the Commissioner's powers and duties. As part of the threshhold question of statutory authority, this is a question of law rather than of fact; therefore, the traditional deference due the Department's expertise is not required. From a practical standpoint, however, (1) the Department is more qualified than the courts even though this is a question of law, and (2) the correlation between the requirements and emissions levels is likely to be quite high.

B. CONSTITUTIONALITY

Of the several possible issues here, the only immediately alarming one is equal protection, as it relates to 19-508-26. (See page 9 of 6/27 version.) I think extending the "defense" to group (2) is necessary, and I think some thought should be given to extending it to group (3) as well. But in any event, the burden upon the opposition to prove an equal protection violation is very severe, and the rationale of administrative convenience is an adequate defense.

II. Orders.

The major concern here has been covered: the continuing possibility that the courts will find that what the Department calls an order is a regulation, and therefore subject to the rulemaking process. The second is that the Department will invoke the option of restricting the source's evidence. Since the APA gives each agency abundant discretion in admitting evidence, this is not clearly illegal. But it is reviewable on an ad hoc basis, and therefore could provide a hostile court with an easy means of reversal.

Grounds (and in some cases precedent) for reversal exist in the other areas covered as well. But in view of the fact that O&M is a matter of health and is highly technical subject, the actual probability of reversal appears encouragingly remote.

To: David

From: Fred

III Evidentiary Status of O & M Data

In the absence of binding O & M requirements, the Department may wish to use O & M data as proof of an emmissions violation. If so, the Department, as the moving party in an administrative proceeding, has two burdens: the initial burden of going forward with the evidence and the ultimate burden of persuasion. These will be considered in turn.

The burden of going forward with the evidence is the equivalent of liability to a directed verdict. This burden may shift from party to party during the course of the trial, and the failure to meet it at any time by either party is decisive of the issue. Only when both parties have met their burdens and all the evidence is in, does the burden of ultimate persuasion become significant.

The initial burden may be satisfied through direct evidence, circumstantial evidence (carrying with it an inference or a presumption of fact), or a presumption of law. Since there is now no presumption of law regarding the relation between O & M data and an emission violation, and since O & M data is not direct evidence of emissions, the Department's evidence would be classified as circumstantial. In some jurisdictions this classification would have bearing on legal sufficiency, but in Connecticut, "the law raises no distinction between direct and circumstantial evidence." Notarfranceso v. Smith, 105 Conn. 49, 52 (1926). See also State v. Rome, 64 Conn. 329, 331 (1894). Thus, " a plaintiff may sustain the burden of proof by circumstantial evidence. In many cases . . . it is the only evidence available to prove a fact material to a party's course of action." Badela v. Karpowich, 152 Conn. 360, 363 (1964). See also Hennessey v. Hennessey, 145 Conn. 211, 214 (1958).

The Department will satisfy its burden of going forward if it produces "evidence of such quality and weight that reasonable and fair - minded men in the exercise of impartial judgment might reach different conclusions." Boeing Co. v. Shipman, 411 F. 2d. 365, 374 (5th Cir, 1969). If the Department has done no more than to meet its burden, the regulatee may choose to remain silent or to produce evidence of his own. If he does remain silent, or if he produces evidence such that fair-minded men may still reach different conclusions, the burden of going forward with the evidence is at an end, and the case will be decided on the basis of whether the burden of ultimate persuasion has been met.

If, however, the Department not only meets its burden but goes further, adducing evidence which, if believed, would compel a fair-minded man to decide in its favor, the hearing officer may require the regulatee to produce evidence under pain of losing the case. The converse is true if the regulatee answers the Department's initial case with evidence of compelling persuasiveness. The hearing officer may go about this in two ways. He may render a verdict for the proponent on the strength of the mass of evidence or he may create a rebuttable presumption that the evidence adduced "in common experience leads naturally and logically to the fact inferred or presumed." Mott v. Frassinelli, 148 Conn. 481, 490 (1961). The presumption serves the purpose of evidence (New London v. N. Y., N. H. & H. R. Co., 85 Conn. 596, 1912) but evaporates if the opponent comes forward with other evidence.

Though this model theoretically controls the administrative contested case, it is obviously derived from and is more directly applicable to the judge - jury situation. Since there is no jury in an administrative proceeding, there is often no need for discriminating between points of decision. A close decision concerning the burden of going forward with the evidence may be quite clear in terms of the ultimate burden of persuasion.

That burden in Connecticut is not as severe as it is in some jurisdictions, where circumstantial evidence is insufficient "unless circumstances proved are of such nature and so related to each other that the conclusion reached is the only one that can be fairly and reasonably drawn therefrom." Bowers v. Maire, 137 N. W. 2d 796, 798 (1965). The Connecticut courts, as indicated supra, recognize that circumstantial evidence is often the only kind available. They have also held consistently that an inference from circumstantail evidence need not exclude other hypotheses. Foster v. Hartford Buick, 131 Conn. 348, 351 (1944). International Brotherhood v. Commission on Civil Rights, 140 Conn. 537 (1953). The most frequent formulation of the test is "whether the evidence, fairly and impartially considered, would be likely to induce in the minds of twelve men of ordinary intelligence attentively considering it and using common sense logic 'a reasonable belief that it is more probable than otherwise that the fact in issue is true.'" Robinson v. Southern New England Telephone Co., 140 Conn. 414, 420 (1953). See also Rocky Hill Convalescent Hospital v. The Metropolitan District, 160 Conn. 446 (1971); Ducharme v. City of Putnam, 161 Conn. 135 (1971).

Thus, O & M data will support an inference which, if considered probable, will establish an emissions violation whether or not the regulatee responds with evidence of his own. This inference, based on circumstantial evidence, will be every bit as valid as "direct" evidence.

There are two qualifications to this general assessment. First, Connecticut is among the majority of states generally subscribing to the evidentiary principle that although a circumstantial inference is permissible, an inference based upon an inference cannot satisfy the burden of persuasion. Thus, for instance, an O & M "violation" (assuming there are no binding requirements) may establish a emissions violation, and single emissions violation, may establish a continuous violation, but a single O & M "violation" could not of itself establish a continuous emissions violation. Although the principle has been severely criticized, it has generally prevailed in Connecticut since State v. Kelly, 77 Conn. 266 (1904). There are, however, unequivocal exceptions. See Ruerat v. Stevens, 113 Conn. 333 (1931); Sliuouski v. N. Y., N. H. & H. R. Co., 94 Conn. 303 (1920); and Kakluskas v. Somers Motor Lines, 134 Conn. 35 (1947), in which Wigmore is invoked. "There is, in fact, no rule of law that forbids the resting of one inference upon facts whose determination is the result of other inferences." Wigmore on Evidence, section 41.

The second qualification to the general assessment is that if the regulatee can be shown to have peculiar knowledge of the facts, e.g. direct evidence or equally good circumstantial evidence concerning the emissions violations, the entire burden may be placed upon him. This view has been expressed at least once in Connecticut, in a concurring opinion by Justice Wheeler (taking issue with Justice Thayer) in Grant v. New Departure MFG. Co., 85 Conn. 421, 429 (1912). This was an action to recover the unpaid balance on a broken employment contract. The measure of damages was the contract price less what the plaintiff should have earned by the exercise of reasonable diligence. Justice Wheeler asserted that the burden of proof of non-employment and due diligence should be on the plaintiff, "the party who presumably has peculiar knowledge of the fact." 85 Conn., at 429. Wigmore (cited by Wheeler) is in agreement with this view, as in McCormick. But its general acceptance in Connecticut remains unlikely, due to the persistence of the rule that the moving party must first promulgate a prima facie case, Middletown Trust Co. v. Bregman, 118 Conn. 651 (1934).

IMPOSITION OF CLASS-WIDE O&M STANDARDS

The Department would prefer to impose O&M requirements by means of a class-wide order which could be appealed by those affected in a single adjudicatory hearing. There is some possibility that the courts may regard such orders as disguised rules and invalidate them for want of proper promulgation. But on balance it appears that the device will be acceptable.

The danger of "rule" classification may be avoided:

(1) If the class is sufficiently well-defined and the effect of the order is strictly confined to those individuals and companies that have received notice from the Department. If these conditions are met the courts may find that the statement is not sufficiently "general" to meet the definition of "rule."

(2) If classification as either rule or order is appropriate and the Department has the discretion to treat the statement either way when such a choice exists, U. S. Supreme Court decisions usually favor the rulemaking procedure, but they do not compel it. In any case, federal decisions look to the Federal Administrative Procedure Act, which has a broader definition of rule than does the Connecticut A.P.A. There are no foreign state or Connecticut cases which mandate the rulemaking treatment.

If the class-wide order device proves unworkable, the Department may be able to impose the requirements via a declaratory ruling. A 1973 amendment to Connecticut's A.P.A. appears to give an agency the power to issue such a ruling internally, but internal issuance, as opposed to issuance in response to a petition, may not be binding. Some authorities assert that the declaratory ruling power is an implicit incident to the rulemaking power and thus requires no statutory authority. But the one Connecticut case remotely in point suggests the contrary.

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SUBJECT

A MEANS FOR IMPOSING CLASS-WIDE O&M REQUIREMENTS

Introduction

The Department's ability to set forth enforceable O&M requirements on a class-wide basis will hinge to a great extent upon genre. The principal danger is that a reviewing court will characterize as a regulation what the Department terms an order or a ruling, and then invalidate the regulation for want of proper procedure. Any appeal from a departmental action is certain to adopt this course; whether the Department's determination can survive it is not certain.

The Definitions of Rule and Regulation

A. Connecticut's definition of "regulation" differs from the federal definition of "rule" in that the former refers to statements "of general applicability" while the latter includes statements "of general or particular applicability." Davis maintains that "or particular" was added to the federal APA to make clear "that what is otherwise rulemaking does not become adjudication merely because it applies only to particular parties or to a particular situation." (Davis, s. 5.02.) Connecticut's definition was derived from the Revised Model State Act, the official comment to which notes the distinction:

> The phrase "or particular applicability" in the federal act is omitted from the Model Act, thus limiting its scope but clarifying its meaning. Attention should be called to the fact that rules, like statutory provisions, may be of "general applicability" even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.
>
> (R.M.S.A., Comment to 2(c))

The 'limitation in scope,' according to Cooper, results from the exclusion of "certain rulings which apply to a single person or a small well defined group." (Cooper, 108)

Before the 1971 amendment, Connecticut's definition was to much the same effect. It referred to any statement made "to establish the general policy" of the agency, but specifically excluded "any rules, regulation, orders, approvals, findings, decision or authorizations addressed to or served upon particular or named individuals, partnerships, corporations or associations and not of general applicability." (C.G.S.A. 4-41, 1949 Rev.) But there have been no Connecticut cases construing the meaning of "general applicability." Even in other states, the substantial majority of whose definitions conform to the Revised Model State Act, there has been very little litigation on the point. In Frankenthal v. Wisconsin Real Estate Brokers' Board, 89 N.W. 2d 825 (1958), the Wisconsin Supreme Court held that mimeographeil instruction for renewal of brokers' licenses, providing that each member of a partnership must be licensed in order for the partnership to be licensed, was a statement of policy of "general application" and subject to declaratory review, even though it had not been properly promulgated. The Court said:

> When a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule, the validity of which the applicant is entitled to have tested in a declaratory action 89 N.W. 2d, 827.

The Wisconsin definition was materially identical to Connecticut's.

In Jezek v. Vordemaier, Fla., 227 So. 2d 69 (1969), a real estate broker who was denied a renewal of his license because of late filing was held entitled to a declaratory judgment. Although the case turned upon a determination of whether the complainant was in fact seeking review of the license denial or of the promulgated rule on which it was based, the court in the course of its opinion spoke to the "general applicability" of rules:

> The term "rule"(authorizing a person to obtain a judicial declaration as to the validity of any rule) was intended to apply only to a rule or order promulgated by the agency in the exercise of its quasi-legislative authority having a general application and which uniformly affects the rights of the public or other interested parties coming within the agency's jurisdiction. This is to be distinguished from a "ruling" which is an order affected by the agency in the conduct of a quasi-judicial proceeding which applies only to the issues in that proceeding and affects only the parties thereto...227 So. 2d, 72.

It appears possible, then, that the Department may avoid the rule characterization entirely if the class upon whom requirements are to be imposed is small and well-defined, or if the Department specifically limits the applicability of its final statement to those individuals named in the proceeding. "General applicability" is incapable of being defined in ordinary language and has not been defined in case law; if the Department can produce a sufficient number of specific determinants for setting off each O&M class from other sources, it may convince the courts.

B. The Connecticut definition of "regulation," like the federal definition of "rule," refers to any statement that "implements, interprets or prescribes law or policy." It thus embraces the clearly "legislative" or "substantive" rule at one end of the spectrum, the "interpretative" rule at the other, and the vast taxonomic wilderness between. What Davis terms the "troublesome distinction" between substantive and interpretative rules does not directly concern the Department because the Connecticut APA, unlike its federal counterpart, does not exempt interpretative rules from procedural constraints. (Only the oral hearing is not mandatory.) However, the abundant case law that has developed respecting the distinction may be used against the Department for purposes of classification; actions that have been called "interpretative rule-making" may be similar in many respects to the proceedings contemplated for the imposition of O&M requirements. While interpretative rules are generally analogized to general counsel memoranda construing ambiguous statutes, Cooper notes that other interpretative rules "describe the general discretionary policies to be followed by the agency. For example, an agency given broad discretionary powers in respect to the granting of licenses may formulate a statement of the conditions which must be met in order to obtain a license," (Cooper, 175). But the disturbing implications of this frustratingly unannotated observation may be avoided *first*, if the Department's statement is held not to be generally applicable or *second*, if the statement may be legitimately placed under the aegis of either rule or order, and the former is not prohibitively controlling. In fact, if these implications can be avoided, Cooper's observation may actually be advantageous for the Department because it classes the delineation of conditions pursuant to a delegated discretionary power as an "interpretative" as opposed to a "substantive"statement. This distinction may be useful if the Department chooses to characterize its final product as a "declaratory ruling."

C. A third significant feature of Connecticut's definition is its specific exemption of "declaratory rulings issued pursuant to (s. 4-176)." The federal APA's corresponding provision is the "declaratory order," which is not exempted from the definition of "rule," but introduced in a separate section. It seems clear that the declaratory ruling was adopted at least in part to overcome the dichotomy between rules and orders . Its possible use by the Department will be discussed below.

The Distinction between Rules and Orders.

A. "Order" is not defined in the Connecticut APA, but by implication it means *at least* the final decision following a contested case. A contested case can mean "a proceeding, including but not restricted to ratemaking, price fixing and licensing... in which a hearing is in fact held." The hearing may not be a rulemaking hearing, but this does not necessarily mean that orders and rules are mutually exclusive, as they technically are under the federal APA. If a contemplated action by an agency may be considered both a rule and an order, may the agency choose which course to pursue? Cooper says that it *has* such a choice and claims that the proper basis for decision should be as follows:

> Where an agency faces the alternative of proceeding by rulemaking.... or by adjudication, the process of rulemaking should be utilized except in cases where there is a danger that its utilization would frustrate the effective accomplishment of the agency's functions. Where such danger exists, *e.g.*, where the "agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," or where the problem is so specialized or varying in nature as to be impossible of capture within the boundaries of a general rule" (*SEC v. Chenery Corp.*, 332 U.S. 194, 202 and 203), the advantages to the agency of using the *ad hoc* adjudication technique must be balanced against the possible deleterious public consequences resulting from the retroactive application of a new general standard of application to large numbers of parties who have had no opportunity to be heard as to what the standard is to be. Unless the balance clearly preponderates in favor of the *ad hoc* adjudication method, the agency should utilize rulemaking

> procedures. (Cooper, 182).

Even Davis, who with the federal APA is dealing with a stricter dichotomy, sees a broad role for agency choice:

> Often the best solution of the problem of classifying borderline activities is to avoid classifying them - to skip the labeling and proceed to the problem directly at hand. Thus, if the problem is to determine appropriate procedure for a particular activity, the practical procedural needs may be studied without calling the activity either rulemaking or something else; usually nothing will be lost if the activity is regarded as borderline or mixed or unclassifiable. (Davis, s. 5.01).

B. The U. S. Supreme Court has twice dealt specifically with the issue of agency discretion to formulate policy through adjudicatory proceedings. In SEC. v. Chenery Corp., 332 U.S. 194 (1947), the Court upheld a requirement by the SEC in the course of approving a reorganization plan that preferred stock purchased by management could not be converted into the common stock of a reorganized company. The SEC had issued the same requirement a few years before in approving the same plan, but it had been overturned by the Supreme Court on the grounds that the SEC's stated reason for adopting the requirement, namely its interpretation of legal and equitable precedent, was insufficient. On remand, the SEC reached the same result, but the reason put forth this time was an interpretation of one of the securities statutes. Chenery tried to argue that the second action was precluded as well because the SEC had not promulgated a rule or regulation regarding management trading during reorganization. The Court rejected the argument, holding:

> Not every principle essential to effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development while others must be adjusted to meet particular, unforeseeable circumstances. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity....the choice between proceeding by individual, ad hoc litigation or by general rule is one that lies primarily in the informed discretion of the agency.
>
> (Id., at 202-03)

But the agency does not have complete discretion. In the same case, the Court warned:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct....The function of filling in the interstices of the pertinent legislation should be performed as much as possible through this quasi-legislative promulgation of rules to be applied in the future. Id., at 202.

In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), the NLRB issued an order directing Wyman-Gordon to furnish a list of names of employees eligible to vote in a representative election. The order was based on a rule laid down in an earlier adjudicated NLRB case. The District Court held the order valid, but the Court of Appeals reversed because it had been based on a rule not properly promulgated. The Supreme Court reversed the Court of Appeals, seven to two, but the majority was split on the reason for reversal, four to three. The plurality of four said that while it was improper to exercise rulemaking power in the former adjudicatory proceeding (the Excelsior case) and that that purported rule was invliad, nevertheless the order issued in the instant case had independent validity. The plurality said in the course of its opinion:

> There is no warrant in law for the Board to replace the statutory scheme with a rulemaking procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The "rule" created in Excelsior was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing," whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rulemaking. (Id., at 764-65).

Justices Black, Brennan and Marshall concurred in the result but disagreed with the plurality's reasons. Mr. Justice Black, in his opinion, found that the Board in Excelsior properly followed the adjudicatory procedure rather than rulemaking:

> Although it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rulemaking, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication. Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rulemaking" or "adjudication" under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rulemaking or adjudication. (Id., at 772).

Wyman-Gordon did little more than to muddle the issue and to provide fodder for both sides of the question. None of the opinions, including two dissents, suggested overruling Chenery; none attempted to spell out specific criteria for making the choice. But if a trend is present it is toward rulemaking. In a recent second circuit case dealing with the issue, Bell Aerospace Co. v. NLRB, 475. F 2d 485 (1973), the court reversed an NLRB order recognizing 25 buyers as an appropriate bargaining unit and mandating an election. Judge Friendly said that "if the statements in the opinions of the six Justices (plurality + two dissents) are to mean anything, they must be read as requiring rulemaking here.... The Board was prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but in substance, to use Mr. Justice Douglas' phrase, 'to fit all cases at all times.' " But two additional factors seem to have been important in tipping the scales toward rulemaking. The agency was reversing a long-standing policy to the contrary, and it was the NLRB, with its "congenital disinclination" to follow the rulemaking procedure.

Three final observations ought to be made concerning the Supreme Court's position on the issue.

(1) If there is a trend toward requiring the rulemaking procedure to be used in most istances, it is carefully qualified and anything but definitive.

(2) The authority of any federal decision favoring rulemaking is lessened by virtue of the fact that the federal definition of rule refers to general and particular applicability while Connecticut's definition of regulation refers only to general applicability.

(3) Such authority is further circumscribed by the fact that the federal APA defines "order" in part as what is not rulemaking; mutual exclusivity is not a facet of Connecticut's definitions.

C. Several state courts have exercised the power to set aside agency orders as invalid devices for avoiding the rulemaking process.

In People v. Cull, 176 N.E. 2d 495 (1961, New York), Judge Field, speaking for the Court of Appeals, declared an order of the Traffic Commission fixing the speed limit at 35 m.p.h. in a specific zone to be an improperly filed and published rule and not binding, even though 35 m.p.h. signs were posted in the zone in question:

> That the order of the State Traffic Commissioner here involved falls in the legislative or quasi-legislative category can hardly be doubted. In fixing a speed limit on a state highway, it quite plainly establishes a general course of operation to be effective for the future and by that token comes within the scope of the "rule or regulation" filing requirement of the Constitution. (Id., at 497)

In Josan Mfg. Co. v. State Board of Health, 133 N.W. 2d 301 (1965) , the court held that a letter issued by the board, which provided that certain kinds of fittings were necessary for public bathrooms, was a statement of general policy and therefore a "rule" rather than an order. And in 1962 the New Jersey court reversed an order of the division of alcoholic beverage control in the form of a letter to a whisky seller forbidding him from using Mason jars as containers. The court said that "detailed interpretations or applications of the statute" and regulations for the future guidance of all persons who may be affected" should be properly published. Proceeding by letter in such a case, it said "amounts to ad hoc legislation and a simultaneous determination of violation thereof in a particular situation...where prior thereto the alleged transgression had not been covered or proscribed by statute or regulation." The court proceeded on the principle that a "general mandate, either statutory or administrative, must precede the specific violation." Boller Beverages, Inc. v. Davis, 183 A. 2d 64 (New Jersey, 1962).

Cooper notes that "in situations where it appears that a large number of persons will be affected in substantially the same manner by the administrative decision there is much to be said in favor of the utilization of rulemaking techniques." (Cooper, 179). He cites as an example National Merchandising Corp. v. Public Service Comm., 158 N.E. 2d 714 (New York, 1959), in which two phone companies filed amendments which would have enabled them to limit advertising in telelphone directories. "The Commission - perceiving that the interests of many phone companies and many advertising agencies would be affected - on its own motion instituted proceedings leading to the adoption of a rule of general application."

It should be noted that in each of the cases involving a preference of rule to order there has been a problem of notice or participation by affected parties. In National Merchandising it might have been physically impossible to inform all potential advertisers. Even in the rather bizarre Cull case, it is technically true that lack of written publication could have prevented the motorist from determining the validity of the particular speed limit. The Department is able to define each class with sufficient precision; neither notice nor participation will be a problem.

Cooper notes that the state courts have occasionally substituted the label "order" for "rule."

> Conversely, where a single party (or a small, well-defined group) will bear the brunt of an administrative order, the adoption of rule-making techniques may cause hardship to the individuals affected. This is true because the adoption of such techniques operates to deprive them of the advantages of an adversary type hearing, and of the right to insist that the order be based on specific findings of fact which in turn are supported by substantial evidence, and of the right to the broader scope of judicial review available in cases involving adjudication. So severe are these consequences that the state courts have occasionally intervened, and insisted on the use of the contested-case procedure. (Cooper, 180).

Unfortunately, the cases cited by Cooper involve only single parties, but the reasoning may well apply to the reasonably large classes contemplated by the Department.

D. There are no Connecticut cases dealing squarely with the distinction between orders and rules. But there are cases lending indirect support. The Department's opposition will be arguing that highly specific standards of the type to be imposed should be embodied in regulations, but it has been held that in instances involving the public health and safety, the principle that regulations cannot be too general may be relaxed. In State v. Vachom, 140 Conn. 478 (1953), the court upheld the denial of a license to operate a hospital even though no specific standards had been put forth. Judge Quinlan quoted from State ex rel, Altop v. Billings, 79 Mont. 25, 35:

> The principle requiring standards is subject to "the qualification that where it is impracticable to lay down a definite or all-comprehensive rule, or where the ordinance relates to the administration of a police regulation and is necessary to protect the general welfare, morals and safety of the public it is not essential...that it prescribe all the conditions upon which the license shall be granted or refused." (Id., at 484).

And in Forest Construction Co. v. Planning and Zoning Comm., 236 A. 2d 917 (1967), the court upheld the denial of a subdivider's plan even though that denial was not based on precise formulated standards. The court said:

> It is unrealistic to demand detailed standards which are impracticable or impossible.... As the complexity of economic and governmental

> conditions increases, the modern tendency is liberal in approving broad regulatory standards so as to facilitate the operational functions of administrative boards or commissions. (Id., at 923).

In the same case, the plaintiff appealed on the basis that it was not present at the time of the decision and had received no notice thereof, though it had met with the board informally on previous occasions. The court denied this ground as well, saying:

> Although the requirements of substantial justice must be followed, strict and technical rules of procedure need not be enforced.... Due process deals with matters of substance and the reasonableness of the conclusion of the commission is apparent from a review of the evidence before it. The plaintiff had notice of and was fully aware of the issues with which it was confronted. It had a full opportunity to meet these issues at the series of meetings which its representatives attended. There is no showing of error or prejudice so as to constitute a denial of due process. (Id., at 922).

The Declaratory Ruling Option

A. The Connecticut definition of "regulation" specifically exempts "declaratory rulings issued pursuant to section 4-176." Declaratory rulings are the state counterparts to the federal declaratory order. The use of either has been surprisingly infrequent, and the most authoritative pronouncement on their applicability and effect was in 1956, in the case of Frozen Foods Express v. United States, 351 U.S. 40 (1956). After an investigation and hearing institutued on its own motion, the I.C.C. listed a large number of specified commodities which it had found to be non-agricultural, and hence not exempt from the requirement of a certified of public convenience. The hearing was a public one at which various producers and carriers presented evidence, and the Commission's decision was in the form of an order. Frozen Foods, not a party to the proceeding, brought suit to have it set aside. The District Court said the order was not binding and therefore not subject to judicial review, but the Supreme Court, in an opinion by Mr. Justice Douglas, reversed, saying that the "order" of the Commission "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of criminal penalties. Where unauthorized operation occurs the Commission may proceed administratively and issue a cease and desist order....The Determination made by the Commission is not therefore abstract, theoretical or academic." The Court then proceeded to label the statement itself:

> The "order" of the Commission is in substance a "declaratory one...which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business may be done." (Id., at 44)

According to Davis, "the dissenting view of Mr. Justice Harlan that the order should not be reviewed because it 'nowhere commands' has not won support."

A declaratory order, then, is both binding and reviewable. But because it has been so seldom used, the question of how detailed or "substantive" it may be has not been squarely faced. The federal APA provides that it may be issued "to terminate a controversy or remove uncertainty," and Davis obliquely suggests that this makes it roughly equivalent to a temporary legislative rule:

> "Agencies having the power of legislative (as distinguished from interpretative) rulemaking may certainly render a declaratory order which will be binding on the agency until the agency announces a new ruling or rule; that is, the agency may give assurance that any new ruling or rule will not have a retroactive effect.... The distinction between legislative and interpretative rules is necessary because only an agency having a power to make legislative rules may issue a binding ruling." (Davis, S. 50, 1951 ed.)

Elsewhere, Davis claims that any statement which is a product of an adjudication and does not "command" (even though it is binding) is a declaratory order. Davis' samples include "issuance of a certificate of convenience and necessity, issuance of a license, approval of a rate increase, approval of a merger or reorganization, the denial of any of the foregoing, and the denial of a cease and desist order." Nonetheless, very few statements from federal agencies have been characterized as declaratory orders, and of those that have, none has been as detailed as the listing of non-agricultural products in Frozen Foods, supra.

State counterparts to the declaratory order (usually termed declaratory rulings) are also infrequent and are usually interpretative in the ordinary sense of the word. (A statute or a regulation will be held applicable or not applicable in a narrowly defined situation.) See Aizen v. Penn. Pub. Util. Comm., 60 A 2d 443 (Penn., 1948); Wisconsin Fertilizer Ass'n v. Karns, 158 N.W. 2d 294 (Wisc., 1968); Pacesetter v. Village of Olympia Fields, 244 N.E. 2d 369 (Ill., 1968). The only state case suggesting broader declaratory powers is Knudsen Creamery Co. v. Brock, 234 P. 2d 26 (Cal., 1951), in which the court upheld an order establishing minimum prices to be paid by distributors for milk according to established marketing areas. Here, however, the order, which the court called "legislative in character," was specifically sanctioned by statute.

But if there are no directly supportive cases, neither are there any decisions limiting the specificity of a declaratory order or ruling. Precedents suggest that the declaratory ruling is interpretative in character. And Cooper includes the formulation of discretionary policies among interpretative acts (Cooper, 175). It is true that Cooper in that context was distinguishing substantive from interpretative rules, but that is precisely what a declaratory ruling appears to be -- an interim interpretative rule.

B. Assuming that a declaratory ruling may be as detailed as the Department desires, what effect will it have in Connecticut? Davis contends that agencies may issue declaratory rulings irrespective of statute, as an incident to the power to make legislative rules. Moreover, he claims, these declaratory rulings may have "just as much binding effect on the agencies, on the parties, and on the courts as any other order." (David, s. 4.11). The only state case in support of this position, however, is Electrolux Corp. v. Miller, O 36 N.E. 2d 633 (N.Y., 1941), which held valid a determination by the Industrial Commissioner that sales supervisors were "employees" within the meaning of a certain labor statute:

> Though we agree that the statute does not, in express terms or by implication, confer upon the Commissioner power to make advisory or declaratory decisions defining obligation arising under statute...it leaves room for the exercise of discretion by the Commissioner charged with responsibility for its administration and in the exercise of that discretion the Commissioner may make rules and orders which are immediately effective or part of a reasonable procedure for the performance of duties imposed by law.
>
> (Id., at 636)

On the face of this one case, however, is the Report of the Attorney General's Committee on Administrative Procedure (1941), where it is asserted on page 31 that "without statutory authority an administrative agency is powerless to render a binding declaratory ruling." And once a state has enacted a declaratory ruling statute (as Connecticut has), it may by implication limit any "incidental powers" existing beforehand to its own terms.

If section 4-176 provides the sole authority for the issuance of declaratory rulings, it provides one minor advantage and one major disadvantage for the Department. The advantage is that it is not limited like the federal version to the termination of a controversy or the removal of uncertainty, which imples the existence of a bona fide prior dispute. It simply says that "each agency may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency."

The disadvantage is the final sentence, which appears to limit the effect of rulings not issued in response to request. "Rulings disposing of petition have the same status as agency decisions or orders in contested cases." One interpretation hinges on the negative pregnant kind of argument and suggests that rulings not disposing of petitions -- i.e., discretionary ones -- have only an advisory opinion effect. But another interpretation is that the final sentence is the result of a drafting oversight. The 1971 version of section 4-176 provided only for declaratory rulings disposing of petitions. The 1973 amendment added "in its discretion," which arguably not only made the rulings non-mandatory but allowed them to be internally generated. If so, the final sentence, instead of remaining unchanged, should have eliminated the limiting words "disposing of petitions." Otherwise the amendment would be giving an agency something it always had -- the power to issue advisory opinions.

There are no Connecticut cases directly in point. But in Hardware Mutual Casualty v. Premo, 153 Conn. 467 (1966), the court found a preliminary rate bulletin issued by the Insurance Commissioner to be legal but not binding because couched in terms of a 'preliminary guideline.' The court did not find it necessary to address the issue directly, but the briefs on both sides assumed that had it not been characterized as "informal" and "preliminary," it would have been illegal and unenforceable. Thus, Davis' argument that no statutory authority is necessary will probably have difficulty passing, and reliance for the validity of a declaratory ruling will probably have to be placed in section 4-176.

Conclusion

The Department would do best to frame its O&M requirements imposition in terms of an ordinary order built around an adjudicatory proceeding. If this is successfully challenged, it can fall back upon the less likely but possible characterization of declaratory ruling. The regulation should specify as many general criteria as possible, and for purposes of an interpretative characterization, should include the phrase "in the discretion of the Department."

O&M REQUIREMENTS: SANCTIONS AVAILABLE TO HEARING OFFICERS

There are two kinds of sanctions which a hearing officer might wish to impose upon a source who either fails to keep or tampers with required monitoring information:

(1) He could create an adverse inference arising from such failure; or

(2) He could restrict the scope of admissible evidence available to the source.

The adverse inference option will probably succeed in the event that the monitoring data has been destroyed. Its potential where the source has never kept the information is much weaker. Case law suggests that for an adverse inference to have effect, the Department must first present a prima facie case. In a number of foreseeable situations this will not be possible. This will be a formidable barrier unless, through an analogy to the destruction of evidence inference or a policy argument urging effective admininstrative action, the courts can be persuaded to allow the inference itself to constitute a portion of the Department's prima facie case.

To restrict the scope of admissible evidence for the source in the event of his failure to produce information may be to run afoul of the open evidentiary policy of the Connecticut A.P.A. A voluntary agreement to this effect, however, remains a distinct possibility.

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	AGENCY	ADDRESS	

SUBJECT

Legal Sanctions Available to DEP Hearings Officer for Either Failure to Keep or Tampering With Required Parameter Monitoring Information

I. Statement of Issues

The basic inquiry dealt with in this memo is the nature of legal sanctions which a DEP hearings officer can impose on a source that fails to keep required monitoring information. It is assumed here that the source has been given specific advance warning of the effect of his actions so that no notice problem exists. The extent of legal sanctions thus rests rather directly upon what is permissible under applicable case law and the judicial tools developed therein and upon the modifications of these rules by administrative law and the Connecticut APA in general.

Two major strategies are potentially available. First, the hearings officer can create an adverse evidentiary inference from either the failure to keep or for the alteration of monitoring records. The effect of this inference varies under several different analogous circumstances which might have application here. (a) It may affect the weight to be given to the sources' evidence which would have been covered by the monitoring data but not supply substantive evidence on that point, i.e. not go to the establishment of a prima facie case. (b) It may diminish the weight to be given to the entirety of the sources' case but not contribute to the prima facie case. (c) This inference may itself constitute part of the Department's prima facie case. (d) Absence of monitoring data may authorize the use of, and may strengthen the impact of, more indirect proof of violation. (e) Such actions may by themselves constitute sufficient cause to decide the issue against the source.

The second strategy is to restrict the source (with advance notice) to certain specific types of evidence. In this situation the source would have the option of producing either monitoring evidence or other suitable documentary evidence. Furthermore, this device could be combined with the requirement of record keeping. Under all formulations, this second device would mean that if the Department established a prima facie case and the source failed to produce the designated information, it would lose.

II Conclusion

An adverse inference under Connecticut law is generated whenever a party which has evidence in its possession that should be probative on the issues before the court fails to introduce that evidence at hearing. The inference, if generated, at least affects the strength of the party's case against which it is raised and may be considered to constitute substantive evidence. Two aspects of the adverse inference rule arising from failure to introduce evidence present problems for its use by the DEP hearings officer in the situation where monitoring evidence is not kept as required. First, the traditional judicial formulation of this rule only applies when the evidence is available at the time of trial. Second, the inference does not arise until a *prima facie* case has been generated by the party seeking to utilize the inference and cannot itself count as substantive evidence going to establish that *prima facie* case.

Case law on destruction or spoliation of evidence is much more helpful for our problem. By definition, such evidence is not available at trial, and there are cases which indicate that specific understanding or notice that the information will be useful in the upcoming hearing will be sufficient to create a foundation for the adverse inference if such evidence is lost or destroyed. Furthermore, tampering with or altering evidence to be used at the hearing presents the clearest case for the use of the adverse inference. In spite of the clear availability of the inference in the case of destroyed evidence or (if the analogy is accepted) a refusal to keep such data when required to do so, the weight of case law in other jurisdictions, there being no Connecticut law on this issue, indicates that a *prima facie* case must be established before the inference arises.

The necessity of using tools such as the adverse inference to protect the administrative process and administrative dependence on information gathering by regulatees gives strong support to the relaxation of both the prerequisite of a prima facie case and the requirement that the evidence have been produced at one time and then either destroyed or withheld at trial. However, the Connecticut APA affects this argument. It strongly supports the right of the agency to use its experience to inform the evaluation of evidence but seems more narrowly to confine the agency in its efforts to substitute expertise and experience for evidence itself. As I analyze the problem confronting us, extending the inference to cover cases where required records are never generated, is supported by the policy supporting administrative effectiveness and is permitted under the APA. On the other hand, extension of this tool to the situation where a prima facie case had not been established, while receiving policy argument support, runs afoul of the APA's restriction of agency expertise as a substitute for evidence. Only official notice can be used to effectuate this substitution and I am afraid that agency expertise does not give much support to this extension, which is the type of process for which courts seem to possess even more expertise. There remains some hope, however, that the necessity of using this device to protect the administrative process will be accepted. Logic and analogy to sanctions imposed for refusal to abide by discovery orders support our position, but unfortunately I am skeptical that the conservative Connecticut Supreme Court will agree.

My conclusion is therefore that the prima facie case prerequisite remains as a barrier, but through analogy to the destruction of evidence adverse inference, through support from a policy argument designed to support effective administrative action, and by sympathetic APA treatment, we can use this inference even though the information was never generated. Nevertheless, it must be noted that the circumstances giving rise to this failure to keep the monitoring information must logically support the conscious avoidance by the source of the production of information adverse to its position; something more than negligence and inadvertence must be shown, and the Department should make its position as strong as possible by clearly informing and continually reminding the source of the consequence of its actions.

I remain very fearful of the mechanism of restricting the types of evidence the source can introduce at trial. It appears to conflict at least with the basic spirit, if not the precise letter, of the APA in its support of the broadest possible right of the regulatee to introduce evidence in support of its case. Furthermore, I am unable to find precedent for this practice without statutory authorization. Finally, I believe policy arguments backing our position are weak since we seem by this procedure only to be preventing the finder of fact, which is here a judge-like figure rather than "an easily misled jury," from hearing all the evidence and weighing it according to its proper value and the credibility of witnesses.

Unless closely analagous practice can be found, I would advise against restricting the types of evidence presentable at hearing by official action. I believe there is much legal risk.My conclusion, however, says little about "voluntary" agreements to accomplish this same purpose, and they remain a possibility.

III. The Adverse Inference

A. Judicial Treatment of Failure to Testify or Produce Other Evidence at Trial

1. General Statement of the Rule

Wigmore states the general proposition as follows:

> The failure to bring before the tribunal some circumstance, document, or witness when either the party himself or his opponent claims that the facts would thereby be elucidated serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure.

2 Wigmore on Evidence, § 285 (3d ed. 1940).

Connecticut courts adopt this general formulation:

> It is certainly a maxim that all evidence is to be weighted according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

Cupo v. Royal Ins. Co., 101 Conn. 586, 592, 126 A. 844 (1924)

2. Requirement of Prima Facie Case as a Precondition of the Inference

However, as applied in this state the inference does not arise until the burden of producing evidence has shifted to the defendent.

> It is not applicable until the plaintiff has first made out a prima facie case. The inference drawn from the failure to testify does not supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.
>
> . . . .

> It not infrequently happens that some fact essential to a party's case can be proved only by the evidence of the opposing party. That such evidence must come from the mouth of a hostile witness or is otherwise unavailable does not relieve the party of the burden of proving such essential fact.

Middletown Trust Co. v. Bregman, 118 Conn. 651, 657-58, 174 A. 67(1934). See also Halpine v. Halping, 138 Conn. 578, 580-81, 87 A. 2d 146 (1952).

The major justification for the restriction that a prima facie case must be established before the inference is created is that until a prima facie is generated and until the defendant has reached that realization (See Halpine v. Halpine, supra, 138 Conn. at 580.) he retains the sufficient explanation for his silence that there is no need to respond to an insufficient case.

International Union (UAW) v. NLRB. 459 F. 2d 1329, 1344 (D.C. Cir. 1972); U.S. v. Roberson, 233F. 2d 517, 519 (5th Cir. 1956).

3. Evidence Must be Available

In general, for the adverse inference to arise with respect to a failure to introduce evidence at trial the evidence must exist at that moment.

> There are two requirements for the operation of the rule [of an unfavorable inference for failure to produce a witness]: The witness must be available, and he must be a witness whom the party would naturally produce.

Secondino v. New Haven Gas Co. 147 Conn. 672, 165 A. 2d 598 (1960) [Emphasis added.]

While the Connecticut cases do not spell out the justification for this last requirement, the logic is clear. Having neither evidence available at the time of the hearing, some duty to have that evidence available, or some responsibility for its absence, no substantial logical inference arises that the evidence is not being produced because of the party's consciousness that it is unfavorable.

Given this last aspect of the adverse inference rule we are left with a partial analogy for generating an adverse inference from the fact that monitoring data does not exist as required. Two major difficulties remain. First, we must, as a prerequisite, establish a prima facie case, which the absence of data may make very difficult. Second, the traditional judicial formulation requires that the evidence exist at the time of hearing. However, I believe the theory of the second requirement gives us hope for overcoming it in circumstances which generate the underlying logical inference, i.e. where circumstances point to a realization by the non-producing party that the evidence would be damaging.

B. Judicial Treatment of Spoliation or Destruction of Evidence

1. Circumstances Creating the Inference

The destructionor spoliation of evidence, which if available at the time of trial is of the type which would generate an adverse inference, itself will create an adverse inference under proper circumstances. "Proper circumstances" are those which as a logical matter "manifest bad faith" and a "consciousness of a weak case." Therefore mere negligence which results in the destruction of evidence is not enough to create the inference. McCormick on Evidence § 273 (2nd ed. 1972).

The type of records and their general importance or the presence of specific realization or notice by the party of their importance can by itself create this set of circumstances. In Rosen v. U.S., 15 Am.Fed. Tax Reports 501 (D. Minn. 1926) the mere fact that books of account for a business were missing generated the inference in a tax recovery case. The judge found the plaintiffs to be intelligent businessmen who must have been aware of the general importance of the retention of these records for many purposes. Under these conditions

> [i] f, within a short time after they have been in use, they are destroyed or missing, that is a circumstance which carries with it a very strong presumption that if produced, they would be against the interest of those who have been responsible for their convenient loss.

Armstrong v. Belding Bros. & Co. 280 F. 895, 898 (D. Conn. 1922), a federal patent case arising in Connecticut, presents the most typical factual setting for this inference.

> The destruction, during the pending of the action of books and records of the defendant, which, as the defendant must have known, might have a material bearing on the question involved, if the plaintiff's contention was ultimately sustained, was a circumstance requiring explanation on the part of the defendant ....

Weinninger v. U.S. 234 F. Supp 499 (D. Del. 1964) provides by far the closest analogy to the factual pattern we anticipate. That case involved the death of the pilot of a private plane as a result, according to the Court's finding, of air turbulence created by U.S. Air Force training operations. The day following the accident, decedent's brother notified the Air Force Commander by phone that he had witnessed the crash, had seen Air Force planes in the area, and felt them responsible. Subsequent to that communication the Air Force destroyed as part of "' normal records disposition'" slips containing records of the number of practice instrument approaches made the day of the accident. In creating an adverse inference on the issue of whether the turbulence was produced by a training rather than an "operational" flight the court stated:

> Notwithstanding that [the base commander] was thus forewarned that the responsibility of the Government for the accident might be asserted, the "approach control arrival slips" containing vital statistical information were destroyed. Under the circumstances, it must be presumed that if they had been retained, as they should have been, their revelations would not have been helpful to the Government.

Weinninger v. U.S., supra, 234 F. Supp. at 508.

It appears to me that the facts of this case are relatively supportive of the inference we wish to create. The Air Force as part of its regular program of "'records disposition,'" but after notice of their potential importance destroyed records important to issues raised in the case. Neither "consciousness of a weak case" as evidenced by overtly suspicious actions nor destruction of evidence during the pendency of the case were noted by the judge in his ruling. The critical factor appears to be simply the clear notice of the potential importance of this data and the failure of the base commander to alter his information systems to accommodate this anticipated need for evidence.

2. Effect of the Inference

At the minimum, the inference diminished the weight to be given the party's evidence or the point to which the destroyed evidence would have gone, and spoliation under circumstances indicate fraud or obstruction of justice has this impact on the entirety of the party's case. 2 Wigmore on Evidence supra §§ 278, 285, 291; McCormick on Evidence, supra § 273; Sribs Aktieselskapet Orenor v. The Audrey, 181F. Supp. 697

(E.D. Va. 1960). Whether such destruction should provide evidence on a critical point otherwise absent from the case is less certain. Wigmore argues that it should (§ 291), while McCormick states that the great weight of case law is to the contrary (§ 273).

A frequent further effect is that the destruction of the evidence allows the other party license to resort to other evidence, strengthened in value by the absence of better evidence. Armstrong v. Belding Bros. & Co., supra, 280 F. at 899; Kenny v. Commissioner of Internal Revenue 111 F. 2d 374 (5th Circ. 1940). This final position seems to fall squarely between the use of the spoliation only for impeachment after a prima facie case has been established and using it as substantive evidence of the fact in question. Since there are no Connecticut cases on this issue, the approach which the courts will approve in this state is uncertain. Unfortunately, I feel we are not safe in assuming that this inference can be used to establish part of the prima facie case.

C. Judicial Treatment of Refusal to Comply with Discovery Order

A somewhat less direct analogy can be developed between failure to generate data or tampering with data and a refusal to allow discovery. One may refuse to provide information that he has available to a fact finder. He may achieve the same result by refusing to generate that information and can thereby escape the necessity of resisting a discovery order.

Both federal and state rules of civil procedure allow the court to enter a default judgment against a party which refuses to comply with a discovery order or which makes "false and misleading" answers. Rule 37, Fed. Rules of Civil Procedure; Conn. Practice Book § 172. In addition to the default remedy the federal rules allow for a flexible response to refusals to allow discovery including limiting of other evidence which may be introduced by the party at fault, striking defenses, and taking alternative facts as true. It may be the case that the Connecticut Courts have this same power under its authority to "impose such conditions as it deems suitable" in setting aside a non-suit for refusal to allow discovery. Conn. Practice Book § 172.

The major difference between the remedies under these court rules and the problem of inadequately kept or altered monitoring information is that in the former case the party has had a chance to challenge the legitimacy of the requirement in the hearing to compel discovery. Given this fact, the inference of consciousness of a weak case is almost compelled by the refusal to submit to the order and at the same time the authority of the courts is challenged with the resulting need to fashion a sufficient penalty for refusing to comply. Whether the necessity of protecting the administrative process justifies creation of similar sanctions is dealt with in the next section.

D. Special Features of Administrative Agencies

1. The Connecticut APA

The Connecticut Administrative Procedure Act states in relevant portion:

> Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

> [N]otice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. .... The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

Conn. Gen. Stat. Annotated § 4-178(4)

My reading of these sections, as informed by Cooper, State Administrative Law (1965), lends strong support to the position that the adverse inference can only go to the weight of the evidence and cannot stand as substantive evidence on the issue in question. This would also indicate that the administrative agency, assuming it bore the initial burden of introducing evidence, would still be required to establish a prima facie case before it could benefit from this inference.

My conclusion flows from the following interpretation of the statute: First, only evidence and matters officially noticed count as proof. This means that if the inference were to be given substantive effect in Connecticut Courts, it could be so treated under administrative procedures; otherwise it must be officially noticeable or not count as proof. Second, the creation of substantive evidence from failure to keep records or tampering with records does not appear to be the type of endeavor generally included within the expanded notice of capabilities of administrative agencies for "generally recognized technical or scientific facts." It is true that the logical inference of consciousness of guilt is of the proper type of general fact capable of specialized judgment by a legislative body rather than an "adjudicative" or litigative fact (See Cooper, State Administrative Law, supra Chpt. XII, Sect. 5). But the administrative agency appears no more competent these facts than the courts, and the courts have decided not to give the evidence substantive weight.

Third, however, in evaluating the evidence, the agency is allowed to utilize its "experience, technical competence and specialized knowledge." In discussing this phrase, Cooper draws a clear distinction between this process of interpreting the evidence and drawing conclusions therefrom as part of the process of decision and the process of proof where there are tighter restrictions in substituting agency knowledge for proof. Cooper, State Administrative Law, supra, Chapt. XII, Sect. 5 (c)(7). The law recognizes the special ability of agencies to evaluate evidence, and there appears to be some clear logical justification for the argument that the agency has special experience with the required record keeping program and should be allowed to use that experience to create an adverse inference from a failure to keep records or from tampering with them, given proper warning and a failure to explain adequately by the source. Logic and the Administrative Procedure Act would seem to support this minor extension of judicial doctrine to the situation where the evidence was never generated or was altered long before the hearing began. I admit to some uncertainty here but feel it is minor.

2. Special Need to Utilize this Tool to Protect the Integrity of the Administrative Process

In International Union (UAW) v. NLRB, 459 F. 2d. 1329 (D.C. Cir. 1972) the court required the Labor Board to apply the adverse inference for refusal of an employer to produce subpoenaed records. In discussing that subpoena the court stated:

> Moreover, the adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored. It is, of course, always possible for the opposing party to seek enforcement of the subpoena in court. But enforcement against a really intransigent party can be costly and time consuming, particularly in administrative proceedings where the enforcement process is of necessity collateral to the main case. [citing cases] The adverse inference rule allows a tribunal to attach weight to a party's intransigence without resorting to the awkward enforcing process. It permits vindication of the tribunal's authority in situations where vindication might, as a practical matter, be impossible otherwise ....

459 F. 2d at 1338-39.

The above reasoning lends significant support by analogy to the use of the adverse inference to protect the strong agency interest in collecting information to be used as part of the decision process. Furthermore, this argument suggests that the availability of a civil penalty for failure to gather this information does not prohibit the use of this device since it, like the enforcement of the subpoena, may be inadequate for the administrative purpose involved. Information can be withheld from the adjudicative body either by failure or refusal to produce that which is available or by a refusal to generate such information in the first instance. On a policy basis the adverse inference should be available to both where the facts of the case support the logical inference that failure to generate useful information reflected a consciousness of the probably adverse content of that data.

On the basis of the above discussion, I believe that extending the adverse inference to a failure to generate required information is a rather safe move legally even though the case law goes only to situations where the evidence is available at the time of trial or has been destroyed under questionable circumstances. The requirements of workable administrative procedures support this extension and the APA, with its favorable treatment of the use of the "agency's experience" in evaluating evidence, presents little in the way of an obstruction.

As I have argued above, extension to the situation where a _prima facie_ case has not yet been generated appears to be more questionable under the APA since it falls into the more restricted area of generating, rather than evaluating, evidence from the agency's experience. An argument can also be made that the legislature by authorizing civil penalties for a failure to keep this information demonstrated conclusively, in the absence of authorization of other sanction, its intent as to the appropriate remedy. Nevertheless, a strong argument remains that the adverse inference is necessary to protect the integrity of the administrative process and its dependence on information gathered by regulatees themselves. Unless the inference is available as part of the _prima facie_ case, the argument goes, a determined violator can deny the agency the foundation of the inference and can thus limit its liability to the relatively small penalties available for procedural violations ($1000 and $100/day maximum).

Whether this policy argument will be strong enough to persuade a court that the inference may be extended by an agency in administrative proceedings beyond its limits under judicial treatment is unclear to me. Since I see no reason to write this extension into regulations and would argue for its use in an ad hoc fashion as part of the administrative hearing, a ruling against us on appeal would not be terribly costly as it would only affect the single case under appeal. How difficult it will be to establish a prima facie case remains an important unknown to me, which may provide the most productive area for development in solving the present problem.

IV Restricting Types of Proof Admissable at Hearing

A. Formulation of the Administrative Mechanism

This mechanism might take one of two forms. First, there would be no requirement of record keeping, but the source would be notified that if a violation were determined to exist at any time only certain specified types of information would be admissible at the hearing on the issue of whether the violation was continuing. Second, keeping records would be required and there would be notice to the party that only the required evidence would be admissible at the hearing. Note that I am only examining here the question of whether the agency may by official act (either in the regulations or ad hoc at hearing) restrict the type of evidence introduced at hearing. I am not dealing with the issue of whether the burden of proof or persuasion can be shifted.

B. Policy Discussion

I believe at a policy and administrative feasibility level the first of these formulations has real drawbacks. The major component of this problem is that without the requirement of record keeping, assuming an inability to shift the burden of going forward with the evidence to establish a prima facie case (which I believe to be a fact of the situation), this mechanism gives us nothing, in many cases, with which to make out our case. At a policy level, if we are satisfied that the data we are requiring is of high enough quality to be useful, we should want to require it for the purpose of identifying problems to ourselves and to conscientious sources. The second formulation helps us generate, for cases where the requirement is complied with, information from which the prima facie case can be generated. Where no data is kept, like the adverse inference, this mechanism does not help us establish the prima facie case. (Whether we can do this by some mechanism similar to burden shifting seems to me to be unconnected to this device.) However, if the information is not available and the prima facie case is generated, the source will automatically lose; it can introduce no defense.

C. Similar Mechanisms Utilized by Federal Agencies

Both Social Security and Internal Revenue have regulations which require introduction of specific types of evidence in order to establish a claim. For IRS the best example is the substantiation requirement for travel and entertainment expenses as business expenses. Unless detailed records of the specified type are submitted, the deduction will be disallowed. See Tres. Regs. Sec 1. 162-17. Under the Social Security administrative bureaucracy, there are a number of evidentiary requirements for establishing entitlement to benefits. See 20 CFR Secs. 404.701 - 404.728, "Subpart H - Evidence."

There are, however, two distinctions between these administrative mechanisms and ours. The first of these is that under the Federal APA and administrative law in general, the burden of proof and persuasion rests on the party seeking to establish his rights to benefits. This means that evidence need not be required in order to establish a prima facie case. This distinction is of interest to us in that it destroys any support by analogy that a simple designation of types of evidence unaccompanied by a record keeping requirement would receive.

The second distinction is much more critical. Both of these mechanisms as utilized by the agency and incorporated into administrative regulations are authorized by statute. (42 U.S.C.A. 405(a) for Social Security and 26 U.S.C.A. 274(d) for Internal Revenue.) We have no such specific statutory authority, and I can find no general support in the Connecticut APA. In fact, as will be discussed in the next section, I interpret the general thrust of the state's Administrative Procedure Act to be antagonistic to this procedure.

D. Restricting Evidence under the Connecticut APA

The Connecticut APA provides: "Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." Conn. Gen. Stat. Annotated Sec. 4-177(c). With respect to officially noticed material the act states that parties "shall be afforded an opportunity to contest" any noticed material. Conn. Gen. Stat. Annotated Sec. 4-178(4).

These two provisions reflect a strong bias in the act for affording parties the due process right of a full hearing complete with an opportunity to contest all issues with evidence of their own. Cooper's discussion of this section contains numerous cases where agency determinations were overturned because failure to provide adequate opportunity either because of formal short-cutting of the hearings process or because of the exclusion of evidence the court took to be relevant. Cooper, State Admin. Law, supra, Chpt. XII, Sec. 2(e). While none of these cases are on point with our factual situation, they do indicate the agency should tread carefully when it restricts the right to produce evidence. The section on official notice strengthens this general impression. The opportunity given here to refute noticed matters is broader than the right afforded by courts in judicial notice and agency determinations have been routinely overturned for violations of this requirement. Cooper, State Adm. Law, supra, Chapt. XII, Sec. C(3) and C(5).

The one section of the act which allows for exclusion of evidence directly gives us little support.

> Any oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence.

Conn. Gen. Stat. Annotated Sec. 4-178(1). I cannot see how the restrictions we would like to impose fall within this provision. And given that this is the only explicit provision on exclusion, an argument may be made that the type of exclusion we desire is impermissible unless explicitly authorized by statute.

E. Conclusion

I find the approach of limiting the source in the types of evidence it may introduce very shaky legally. It has the definite appearance of denying due process and receives no support in the applicable statutes. Finally a court may argue, and I feel may do so rather persuasively, that the restriction serves little purpose. As a fact finder, the hearings officer would seem to be able to receive all evidence, evaluate its inherent value under the other types of evidence potentially available (the adverse inference), and judge the demeanor and credibility of witnesses. Other than the slowing down of hearings, which can be remedied by the exclusion of "irrelevant, immaterial, or unduly repetitious" evidence, the proceeding is little harmed by allowing in "too much" evidence. On the other hand, the agency would seem to bear a heavy burden if the source failed for some marginally questionable reason to generate the data but stood ready to introduce evidence which the hearings officer would have considered highly credible. (I am certain the appellate court will be informed as to how credible this evidence was.) I believe the hearings officer must stand ready to hear this evidence, but retains a substantial power to evaluate that evidence. If it is of the "wrong type" but the hearings officer would believe it under all the circumstances, I have difficulty understanding why he should be denied that opportunity. Of course there are situations where restricting evidence might be desirable, but I believe the agency should bear a heavy burden in justifying that restriction.

APPENDIX A

THE ENFORCEMENT ACT

Substitute Senate Bill No. 1973

PUBLIC ACT NO. 73-665

AN ACT CONCERNING THE ENFORCEMENT AUTHORITY OF THE COMMISSIONER OF ENVIRONMENTAL PROTECTION.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (a) Any person who knowingly or negligently violates any provision of section 14-100b or 14-100c of the 1971 noncumulative supplement to the general statutes, subdivision (3) of subsection (b) of section 15-121 of the 1971 noncumulative supplement to the general statutes, as amended by number 91 of the public acts of 1972, chapter 348 of the general statutes, as amended, sections 19-507, 19-508, 19-513a, 19-514, or 19-519, of the 1971 noncumulative supplement to the general statutes, section 19-517 of the 1971 noncumulative supplement to the general statutes, as amended by section 4 of number 103 of the public acts of 1972, section 19-519a of the 1969 supplement to the general statutes, section 1 of number 103 of the public acts of 1972, sections 19-524b, 19-524c, 19-524g, 19-524n, 22a-5, 22a-6 or 22a-7 of the 1971 noncumulative supplement to the general statutes, section 5 of number 155 of the public acts of 1972, sections 25-2, 25-4a, 25-4d, 25-4e, 25-4f, 25-7a, 25-7b, 25-7d, 25-7e, 25-8a, 25-8c, 25-10, 25-11, 25-12, 25-15, 25-26, 25-26a, 25-27, 25-54c to 25-54l, inclusive, or 25-54aa, of the 1971 noncumulative supplement to the general statutes, 25-54cc of the 1971 noncumulative supplement to the general statutes, as amended by section 1 of number 252 of the public acts of 1972, 25-54dd of the 1971 noncumulative supplement to the general statutes, 25-54ee of the 1971 noncumulative supplement to the general statutes, as amended by number 217 of the public acts of 1972, 25-54hh of said supplement, as amended by section 1 of number 237 of the public acts of 1972, 25-54ii, 25-54ll, 25-54oo, 25-54pp, or sections 25-110 to 25-114, inclusive of the 1971 noncumulative supplement to the general statutes or any regulation, order or permit adopted or issued thereunder by the commissioner of environmental protection shall be liable to the state for the reasonable costs and expenses of the state in detecting, investigating, controlling and abating such violation. Such person shall also be liable to the state for the reasonable costs and expenses of the state in restoring the air, waters, lands and other natural resources of the state, including plant, wild animal and aquatic life to their former condition insofar as practicable and reasonable, or, if restoration is not practicable or reasonable, for any damage, temporary or permanent, caused by such violation to the air, waters, lands or other natural resources of the state, including plant, wild animal and aquatic life and to the public trust therein. Institution of a suit to recover for such damage, costs and expenses shall preclude the imposition of a civil penalty for such violation as provided in section 3b of this act or in the schedule or schedules adopted pursuant thereto, but shall not preclude the application of any other remedies.

(b) Whenever two or more persons knowingly or negligently violate any provision of section 14-100b or 14-100c of the 1971 noncumulative supplement to the general statutes, subdivision (3) of subsection (b) of section 15-121 of the 1971 noncumulative supplement to the general statutes, as amended by number 91 of the public acts of 1972, chapter 348 of the general statutes, as amended, sections 19-507, 19-508, 19-513a, 19-514 or 19-519, of the 1971 noncumulative supplement to the general statutes, section 19-517 of the 1971 noncumulative supplement to the general statutes, as amended by section 4 of number 103 of the public acts of 1972, section 19-519a of the 1969 supplement to the general statutes, section 1 of number 103 of the public acts of 1972, sections 19-524b, 19-524c, 19-524g, 19-524n, 22a-5, 22a-6 or 22a-7 of the 1971 noncumulative supplement to the general statutes, section 5 of number 155 of the public acts of 1972, sections 25-2, 25-4a, 25-4d, 25-4e, 25-4f, 25-7a, 25-7b, 25-7d, 25-7e, 25-8a, 25-8c, 25-10, 25-11, 25-12, 25-15, 25-26, 25-26a, 25-27, 25-54c to 25-54l, inclusive, or 25-54aa, of the 1971 noncumulative supplement to the general statutes, 25-54cc of the 1971 noncumulative supplement to the general statutes, as amended by section 1 of number 252 of the public acts of 1972, 25-54dd of the 1971 noncumulative supplement to the general statutes, 25-54ee of the 1971 noncumulative supplement to the general statutes, as amended by number 217 of the public acts of 1972, 25-54hh of said supplement, as amended by section 1 of number 237 of the public acts of 1972, 25-54ii, 25-54ll, 25-54oo, 25-54pp, or sections 25-110 to 25-114, inclusive of the 1971 noncumulative supplement to the general statutes or any regulation, order or permit adopted or issued thereunder by the commissioner and responsibility for the damage caused thereby is not reasonably apportionable, such persons shall, subject to a right of equal contribution, be jointly and severally liable under this section.

(c) Any person whose acts outside Connecticut contribute to environmental damage in Connecticut shall be subject to suit under this section if such person is subject to in personem jurisdiction within this state pursuant to section 52-59b of the 1971 noncumulative supplement to the general statutes, or if such person, in person or through an agent, expects or should reasonably expect his acts outside this state to have an effect upon the environment in this state and process upon any such person shall be served in the manner set forth in section 52-59b of the 1971 noncumulative supplement to the general statutes.

Sec. 2. (NEW) (a) The commissioner of environmental protection is authorized to adopt a schedule or schedules establishing the amounts, or the ranges of amounts, of the civil penalties which may become due under this section. Such schedule or schedules shall be adopted by the commissioner after public hearings pursuant to section 22a-6 of the 1971 noncumulative supplement to the general statutes and may be amended from time to time in the same manner as for adoption. The civil penalties established for each violation shall be of such amount as to insure immediate and continued compliance with applicable laws, regulations, orders and permits. Such civil penalties shall not exceed the following amounts:

(1) For failure to file any registration, plan, report or record, or any application for a permit, for failure to display any registration, permit or order, or file any other information required pursuant to any provision of section 14-100b or 14-100c of the 1971 noncumulative supplement to the general statutes, subdivision (3) of subsection (b) of section 15-121 of the 1971 noncumulative supplement to the general statutes, as amended by number 91 of the public acts of 1972, chapter 348 of the general statutes, as amended, sections 19-507, 19-508, 19-513a, 19-514, or 19-519, of the 1971 noncumulative supplement to the general statutes, section 19-517 of the 1971 noncumulative supplement to the general statutes, as amended by

section 4 of number 103 of the public acts of 1972, section 19-519a of the 1969 supplement to the general statutes, section 1 of number 103 of the public acts of 1972, sections 19-524b, 19-524c, 19-524g, 19-524n, 22a-5, 22a-6 or 22a-7 of the 1971 noncumulative supplement to the general statutes, section 5 of number 155 of the public acts of 1972, sections 25-2, 25-4a, 25-4d, 25-4e, 25-4f, 25-7a, 25-7b, 25-7d, 25-7e, 25-8a, 25-8c, 25-10, 25-11, 25-12, 25-15, 25-26, 25-26a, 25-27, 25-54c to 25-54l, inclusive, or 25-54aa, of the 1971 noncumulative supplement to the general statutes, 25-54cc of the 1971 noncumulative supplement to the general statutes, as amended by section 1 of number 252 of the public acts of 1972, 25-54dd of the 1971 noncumulative supplement to the general statutes, 25-54ee of the 1971 noncumulative supplement to the general statutes, as amended by number 217 of the public acts of 1972, 25-54hh of said supplement, as amended by section 1 of number 237 of the public acts of 1972, 25-54ii, 25-54ll, 25-54oo, 25-54pp, or sections 25-110 to 25-114, inclusive of the 1971 noncumulative supplement to the general statutes or any regulation, order or permit adopted or issued thereunder by the commissioner, and for other violations of similar character as set forth in such schedule or schedules, no more than one thousand dollars for said violation and in addition no more than one hundred dollars for each day during which such violation continues after receipt of a final order of the commissioner under subsection (c) of this section assessing the civil penalty for such violation;

(2) For deposit, placement, removal, disposal, discharge or emission of any material or substance in violation of any provision of section 14-100b or 14-100c of the 1971 noncumulative supplement to the general statutes, subdivision (3) of subsection (b) of section 15-121 of the 1971 noncumulative supplement to the general statutes, as amended by number 91 of the public acts of 1972, chapter 348 of the general statutes, as amended, sections 19-507, 19-508, 19-513a, 19-514, or 19-519, of the 1971 noncumulative supplement to the general statutes, section 19-517 of the 1971 noncumulative supplement to the general statutes, as amended by section 4 of number 103 of the public acts of 1972, section 19-519a of the 1969 supplement to the general statutes, section 1 of number 103 of the public

acts of 1972, sections 19-524b, 19-524c, 19-524g, 19-524h, 22a-5, 22a-6 or 22a-7 of the 1971 noncumulative supplement to the general statutes, section 5 of number 155 of the public acts of 1972, sections 25-2, 25-4a, 25-4d, 25-4e, 25-4f, 25-7a, 25-7b, 25-7d, 25-7e, 25-8a, 25-8c, 25-10, 25-11, 25-12, 25-15, 25-26, 25-26a, 25-27, 25-54c to 25-54l, inclusive, or 25-54aa, of the 1971 noncumulative supplement to the general statutes, 25-54cc of the 1971 noncumulative supplement to the general statutes, as amended by section 1 of number 252 of the public acts of 1972, 25-54dd of the 1971 noncumulative supplement to the general statutes, 25-54ee of the 1971 noncumulative supplement to the general statutes, as amended by number 217 of the public acts of 1972, 25-54hh of said supplement, as amended by section 1 of number 237 of the public acts of 1972, 25-54ii, 25-54ll, 25-54oo, 25-54pp, or sections 25-110 to 25-114, inclusive of the 1971 noncumulative supplement to the general statutes or any regulation adopted thereunder by the commissioner, and for other violations of similar character as set forth in such schedule or schedules, no more than twenty-five thousand dollars for said violation and in addition no more than one thousand dollars for each day during which such violation continues after receipt of a final order of the commissioner under subsection (c) assessing the civil penalty for such violation;

(3) For violation of the terms of any final order, except final orders under subsection (e) of this section and emergency orders and cease and desist orders as set forth in subdivision (4) of this subsection, of the commissioner, for violation of the terms of any permit issued by the commissioner, and for other violations of similar character as set forth in such schedule or schedules, no more than twenty-five thousand dollars for said violation and in addition no more than one thousand dollars for each day during which such violation continues after receipt of a final order of the commissioner under subsection (c) of this section assessing the civil penalty for such violation;

(4) For violation of any emergency order or cease and desist order of the commissioner, and for other violations of similar character as set forth in such schedule or schedules, no more than twenty-five thousand dollars for said violation and in addition no more than five thousand dollars

for each day during which such violation continues after receipt of a final order of the commissioner under subsection (c) assessing the civil penalty for such violation.

(b) In adopting the schedule or schedules prescribed by this section, the commissioner shall consider the amounts, or ranges of amounts, of assessment necessary to insure immediate and continued compliance, and the character and degree of injury or impairment to, or interference with, (1) public health, safety or welfare, (2) the public trust in the air, water, land and other natural resources of the state, and (3) reasonable use of property which is caused or is likely to be caused by the type of activity described in such schedule or schedules.

(c) In addition, in setting a civil penalty in a particular case, the commissioner shall consider all factors which he deems relevant, including, but not limited to, the following:

(1) The amount of assessment necessary to insure immediate and continued compliance;

(2) The character and degree of impact of the violation on the natural resources of the state, especially any rare or unique natural phenomena;

(3) The conduct of the person incurring the civil penalty in taking all feasible steps or procedures necessary or appropriate to comply or to correct the violation;

(4) Any prior violations by such person of statutes, regulations, orders or permits administered, adopted or issued by the commissioner;

(5) The economic and financial conditions of such person;

(6) The character and degree of injury to, or interference with, public health, safety or welfare which is caused or threatened to be caused by such violation;

(7) The character and degree of injury to, or interference with reasonable use of property which is caused or threatened to be caused by such violation.

(d) If the commissioner has reason to believe that a violation has occurred for which a civil penalty is authorized by this section, he may send to the violator, by certified mail, return receipt requested, or personal service, a notice which shall include:

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(1) A reference to the sections of the statute, regulation, order or permit involved;

(2) A short and plain statement of the matters asserted or charged;

(3) A statement of the amount of the civil penalty or penalties to be imposed upon finding after hearing that a violation has occurred or upon a default; and

(4) a statement of the party's right to a hearing

(e) The person to whom the notice is addressed shall have twenty days from the date of receipt of the notice in which to deliver to the commissioner written application for a hearing. If a hearing is requested then, after a hearing and upon a finding that a violation has occurred, the commissioner may issue a final order assessing a civil penalty under this section which is not greater than the penalty stated in the notice. If such a hearing is not so requested, or if such a request is later withdrawn, then the notice shall, on the first day after the expiration of such twenty day period or on the first day after the withdrawal of such request for hearing, whichever is later, become a final order of the commissioner and the matters asserted or charged in the notice shall be deemed admitted unless modified by consent order, which shall be a final order. Any civil penalty may be mitigated by the commissioner upon such terms and conditions as he in his discretion deems proper or necessary upon consideration of the factors set forth in subsection (b) hereof.

(f) All hearings under this section shall be conducted pursuant to sections 4-177, to 4-184, inclusive, of the 1971 noncumulative supplement to the general statutes. The final order of the commissioner assessing a civil penalty shall be subject to appeal as set forth in section 4-183 of the 1971 noncumulative supplement to the general statutes except that any such appeal shall be taken to the superior court for Hartford county and shall have precedence in the order of trial as provided in section 52-191 of the 1969 supplement to the general statutes. Such final order shall not be subject to appeal under any other provision of the general statutes. No challenge to any final order of the commissioner assessing a civil penalty shall be allowed as to any issue which could have been raised by an appeal of an earlier order, notice, permit, denial or other final decision by the commissioner. Any civil penalty authorized by this section shall become due and payable (i) at the time of receipt of a final order in the case of a civil penalty assessed in such order after a hearing, (ii) on the first day after the expiration of the period in which a hearing may be requested if no hearing is requested, or (iii) on the first day after any withdrawal of a request for hearing.

(g) Any person acting within the terms and conditions of a final order or permit issued to him by the commissioner shall not be subject to a civil penalty, under this section, for such actions.

(h) A civil penalty assessed in a final order of the commissioner under this section may be enforced in the same manner as a judgment of the superior court. Such final order shall be served in person or by certified mail, return receipt requested. Any notice of violation or final order against a private corporation shall be served upon at least one of the individuals enumerated in section 52-57 of the general statutes. After entry, a transcript of such final order may be filed by the commissioner, without requiring the payment of costs as a condition precedent to such filing, in the office of the clerk of the superior court in any one or more of the following counties: Any county in which the respondent resides, any county in which the respondent has a place of business, any county in which the respondent owns real property and any county in which any real property which is a subject of the proceedings is located; or, if the respondent is not a resident of the state of Connecticut, in Hartford county. Upon such filing, such clerk or clerks shall docket such order in the same manner and with the same effect as a judgment entered in the superior court within the county. Upon such docketing, such order may be enforced as a judgment of such court.

(i) The provisions of this act are in addition to and in no way derogate from any other enforcement provisions contained in any statute administered by the commissioner. The powers, duties and remedies provided in such other statutes, and the existence of or exercise of any powers, duties or remedies hereunder or thereunder shall not prevent the commissioner from exercising any other powers, duties or remedies provided herein, therein, at law or in equity.

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Sec. 3. Section 22a-6 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: The commissioner may [(a)] (1) adopt, amend or repeal SUCH environmental standards, criteria and regulations, AND SUCH PROCEDURAL REGULATIONS AS ARE NECESSARY AND PROPER TO CARRY OUT HIS FUNCTIONS, POWERS AND DUTIES [to carry out the purposes and provisions of this title and sections 2-20a, 5-238a, subsection (c) of section 7-131a, sections 7-131e, 7-131f, subsection (a) of section 7-131g, sections 7-131i, 7-131l, 8-211, 8-212, subsection (a) of section 10-321, subsections (51) and (52) of section 12-81, sections 12-217c, 12-217d, 12-247a, 12-252a, 12-252b, 12-258b, 12-258i, 12-265b, 12-265c, 12-270b, 12-271a, subsections (u) and (v) of sections 12-412, subsections (a) and (b) of section 13a-94, sections 13a-142a, 14-100b, 14-100c, chapter 268, subsection (c) of section 18-99, subsections (b) and (c) of section 19-24, section 19-25a, subdivisions (2) and (3) of section 19-25b, sections 19-25d, 19-25e, 19-25f, 19-25g, 19-25i, Part Ia of chapter 348, section 19-408, chapter 360, sections 22-7a, 22-7b, 22-7d, 22-7e, 22-7f, 22-7g, 22-7i, 22-7l, 22-7m, 22-91c, 22-91e, chapters 447 and 448, sections 23-35, 23-37a, 23-41, chapter 462, section 24-5, chapter 473, sections 25-26, 25-28, 25-29, 25-34, chapter 474a, sections 25-57, 25-62, 25-67, chapters 477, 478, 479, section 25-127, subsection (b) of section 25-128, subsection (a) of section 25-131, chapters 490, 491, sections 26-257, 26-297, 26-303 and 47-46a]. No adoption, amendment or repeal of any standard, [criteria] CRITERION or regulation shall take effect except after a public hearing, thirty days prior notice of the date, time, place and subject matter of which shall be published in the Connecticut Law Journal, or earlier than thirty days after the publication thereof in said law journal; [(b)] (2) enter into contracts with any person, firm, corporation or association to do all things necessary or convenient to carry out the functions, powers and duties of the department; [(c)] (3) [by himself or his designated agent,] initiate and receive complaints as to any actual or suspected [source of pollution or for purpose of ascertaining compliance or noncompliance with any provision of the general statutes or regulation which may be promulgated pursuant to this title or any of said chapters or sections]

VIOLATION OF ANY STATUTE, REGULATION, PERMIT OR ORDER ADMINISTERED, ADOPTED OR ISSUED BY HIM. The commissioner [or his designated agent] shall have the power to hold hearings, administer oaths, take testimony and subpoena witnesses and evidence, enter orders and institute legal proceedings including, but not limited to, suits for injunctions, for the enforcement of [his orders and regulations in accordance with this title or any of said chapters or sections] ANY STATUTE, REGULATION, ORDER OR PERMIT ADMINISTERED, ADOPTED OR ISSUED BY HIM; [(d)] (4) IN ACCORDANCE WITH REGULATIONS ADOPTED BY HIM, REQUIRE, ISSUE, RENEW, REVOKE, MODIFY OR DENY PERMITS, UNDER SUCH CONDITIONS AS HE MAY PRESCRIBE, GOVERNING ALL SOURCES OF POLLUTION IN CONNECTICUT WITHIN HIS JURISDICTION; (5) [by himself or his designated agent] IN ACCORDANCE WITH CONSTITUTIONAL LIMITATIONS, enter at all reasonable times upon any public or private property, except a private residence, for the purpose of inspection and investigation to ascertain possible violations of [this title or any of said chapters or sections or of regulations made hereunder,] ANY STATUTE, REGULATION, ORDER OR PERMIT ADMINISTERED, ADOPTED OR ISSUED BY HIM [in accordance with constitutional limitations,] and the owner, managing agent or occupant of any such property shall permit such entry, OR HE MAY APPLY TO ANY COURT HAVING CRIMINAL JURISDICTION FOR A WARRANT TO INSPECT SUCH PREMISES TO DETERMINE COMPLIANCE WITH ANY STATUTE, REGULATION, ORDER OR PERMIT ADMINISTERED, ADOPTED OR ENFORCED BY HIM, provided any information relating to secret processes or methods of manufacture or production ascertained by the commissioner [or his agents] during, or as a result of any inspection, investigation, hearing or otherwise shall be kept confidential and shall not be disclosed; [(e)] (6) undertake any studies, inquiries, surveys or analyses he may deem relevant, through the personnel of the department or in cooperation with any public or private agency, to accomplish the FUNCTIONS, POWERS AND DUTIES OF THE COMMISSIONER [purposes of this title or any of said chapters or sections]; (7) REQUIRE THE POSTING OF SUFFICIENT PERFORMANCE BOND OR OTHER SECURITY TO ASSURE COMPLIANCE WITH ANY PERMIT OR ORDER; (8) PROVIDE BY NOTICE PRINTED ON ANY FORM THAT ANY FALSE STATEMENT MADE THEREON OR PURSUANT THERETO IS PUNISHABLE AS A CRIMINAL OFFENSE UNDER SECTION 53a-157 OF THE 1969

SUPPLEMENT TO THE GENERAL STATUTES. [In all cases wherein the commissioner of environmental protection is required to hold hearings, public or otherwise, on any matter within his jurisdiction, he may hold such hearings or may designate a member of his staff to act as a hearing examiner, such hearing examiner to hold such hearing at a time and place designated by the commissioner. The commissioner or the hearing examiner may issue subpoenas, administer oaths and cause the attendance of witnesses and the production of evidence and testimony in any proceeding pending before him. The hearing examiner shall, after each hearing, file with the commissioner a report including a finding of fact and recommendations. After considering the report of the hearing examiner and the testimony of the hearing, the commissioner shall issue such order or permit as is applicable to the particular proceeding.]

Sec. 4. Section 22a-7 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: The commissioner, whenever he finds after investigation that any person [, firm, corporation or association] is causing, engaging in or maintaining, OR IS ABOUT TO CAUSE, ENGAGE IN OR MAINTAIN, any condition or activity which, in his judgment, will result in or is likely to result in [irreversible or irreparable] IMMINENT AND SUBSTANTIAL damage to the environment and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, may, without prior hearing, issue a cease and desist order in writing to such person [, firm, corporation or association] to discontinue, abate or alleviate such condition or activity. Upon receipt of such order such person [, firm, corporation or association] shall immediately discontinue, abate or alleviate OR SHALL REFRAIN FROM CAUSING, ENGAGING IN OR MAINTAINING such condition or activity. The commissioner shall, within ten days of such order, hold a hearing to provide the person [, firm, corporation or association] an opportunity to be heard and show that such condition does not exist. Such order shall remain in effect until ten days after the hearing within which time a new decision based on the hearing shall be made.

Sec. 5. Section 22a-2 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: (a) There shall be a department of environmental protection which shall have jurisdiction over all matters relating to the preservation and protection of the air, water and other natural resources of the state. Said department shall be under the direction of a commissioner of environmental protection who shall be appointed in accordance with the provisions of sections 4-5 to 4-8, inclusive.

(b) AS USED IN THIS ACT AND CHAPTERS 263, 268, 348, 360, 361a, 439, 447, 448, 449, 452, 462, 473, 474, 474a, 476, 477, 478, 479 AND 490, OF THE GENERAL STATUTES, AS AMENDED, EXCEPT WHERE OTHERWISE PROVIDED, "COMMISSIONER" MEANS THE COMMISSIONER OF ENVIRONMENTAL PROTECTION OR HIS DESIGNATED AGENT. THE COMMISSIONER OF ENVIRONMENTAL PROTECTION SHALL HAVE THE AUTHORITY TO DESIGNATE AS HIS AGENT (1) ANY DEPUTY COMMISSIONER TO EXERCISE ALL OR PART OF THE AUTHORITY, POWERS AND DUTIES OF SAID COMMISSIONER IN HIS ABSENCE, (2) ANY EMPLOYEE, ASSISTANT OR AGENT EMPLOYED PURSUANT TO SECTION 22a-4 OF THE 1971 NONCUMULATIVE SUPPLEMENT TO THE GENERAL STATUTES TO EXERCISE SUCH AUTHORITY OF THE COMMISSIONER OF ENVIRONMENTAL PROTECTION AS HE DELEGATES FOR THE ADMINISTRATION OR ENFORCEMENT OF ANY APPLICABLE STATUTE, REGULATION, PERMIT OR ORDER, EXCEPT THE AUTHORITY TO RENDER A FINAL DECISION, AFTER A HEARING, ASSESSING A CIVIL PENALTY UNDER SECTION 2 OF THIS ACT, AND (3) THE COMMISSIONER OF STATE POLICE AND ANY LOCAL AIR POLLUTION CONTROL OFFICIAL OR AGENCY TO EXERCISE SUCH AUTHORITY AS THE COMMISSIONER OF ENVIRONMENTAL PROTECTION DELEGATES FOR THE ENFORCEMENT OF ANY APPLICABLE STATUTE, REGULATION, ORDER OR PERMIT PERTAINING TO AIR POLLUTION, EXCEPT THE AUTHORITY TO RENDER A FINAL DECISION, AFTER A HEARING, ASSESSING A CIVIL PENALTY UNDER SECTION 2 OF THIS ACT.

(c) AS USED IN THIS ACT AND CHAPTERS 263, 268, 348, 360, 361a, 439, 447, 448, 449, 452, 462, 473, 474, 474a, 476, 477, 478, 479 AND 490, OF THE GENERAL STATUTES, AS AMENDED, EXCEPT WHERE OTHERWISE PROVIDED, "PERSON" MEANS ANY INDIVIDUAL, FIRM, PARTNERSHIP, ASSOCIATION, SYNDICATE, COMPANY, TRUST, CORPORATION, MUNICIPALITY, AGENCY OR POLITICAL OR ADMINISTRATIVE SUBDIVISION OF THE STATE, OR OTHER LEGAL ENTITY OF ANY KIND.

Sec. 6. Subsection (a) of section 19-518 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: Any person whose interest is substantially affected by the entry of any order or decision of the commissioner OTHER THAN AN ORDER UNDER SECTION 2 OF THIS ACT may, within fifteen days of the entry of such order or decision, appeal therefrom to the court of common pleas for the county wherein the major portion of the affected property lies, notice of which appeal shall be filed with the commissioner.

Sec. 7. Section 25-17 of said supplement is repealed and the following is substituted in lieu thereof: Any person, firm or corporation, whether public or private, aggrieved by any order, authorization or decision of the commissioner OTHER THAN AN ORDER UNDER SECTION 2 OF THIS ACT may appeal therefrom to the superior court for Hartford county within fifteen days after the issuance of such order, authorization or decision. Such appeal shall have precedence in the order of trial in accordance with the provisions of section 52-192.

Sec. 8. Section 25-54g of said supplement is repealed and the following is substituted in lieu thereof: If the commissioner finds that any municipality is causing pollution of the waters of the state, or that a community pollution problem exists, or that pollution by a municipality or a community pollution problem can reasonably be anticipated in the future, he [shall] MAY issue to the municipality an order to abate pollution. If the commissioner, after giving due regard to regional factors, determines that such pollution can best be abated by the action of two or more adjacent municipalities, he may issue his order jointly or severally to such municipalities. If a community pollution problem exists in, or if pollution is caused by, a municipality geographically located all or partly within the territorial limits of another municipality, the commissioner [shall] MAY, after giving due regard to regional factors, determine which municipality shall be ordered to abate the pollution or [shall] MAY, after giving due regard to regional factors, issue an order to both of such municipalities jointly to provide the facilities necessary to abate the pollution. Any order issued pursuant to this section shall include a time schedule for action by the municipality or municipalities, as the case may be, which may require, but is not limited to, the following steps to be taken by such municipality or municipalities: (a) Submission of an engineering report outlining the problem and recommend solution therefor for approval by the commissioner; (b) submission of contract plans and specifications for approval by the commissioner; (c) arrangement of financing; (d) acceptance of state and federal construction grants; (e) advertisement for construction bids; (f) start of construction; (g) placing in operation.

Sec. 9. Section 25-54h of said supplement is repealed and the following is substituted in lieu thereof: If the commissioner finds that any person prior to May 1, 1967, has caused pollution of any of the waters of the state, which pollution recurs or continues after said date, he [shall] MAY issue an order to abate pollution to such person. The order shall include a time schedule for the accomplishment of the necessary steps leading to the abatement of the pollution. This section shall not apply to any person who is subject to the provisions of section 25-54i.

Sec. 10. Subsection (d) of section 25-54i of said supplement is repealed and the following is substituted in lieu thereof: If the commissioner finds that any person has, after May 1, 1967, initiated, created or originated any discharge into the waters of the state without a permit as required in subsection (a) hereof, or in violation of such permit, he [shall] MAY, notwithstanding any request for a hearing pursuant to section 25-54o or the pendancy of an appeal therefrom, request the attorney general to bring an action in the superior court for Hartford county to enjoin such discharge by such person until he has received a permit from the commissioner or has complied with a permit which the commissioner has issued pursuant to this section. Any such action brought by the attorney general shall have precedence in the order of trial as provided in section 52-191.

Sec. 11. Section 25-54j of said supplement is repealed and the following is substituted in lieu thereof: The commissioner shall periodically investigate and review those sources of discharge which are operating pursuant to any order, permit, directive or decision issued by the water resources commission or the commissioner before or after May 1, 1967, and, if he determines that there has been any substantial change in the manner, nature of volume of such discharge which will cause or threaten pollution to any of the waters of the state, or if he finds that the system treating such discharge, or the operation thereof, no longer insures or adequately protects against pollution of the waters of the state, the commissioner [shall] MAY issue an order to abate such pollution to such person or municipality. Such order shall include a time schedule for the accomplishment of the necessary steps leading to the abatement of the pollution.

Sec. 12. Section 25-54k of said supplement is repealed and the following is substituted in lieu thereof: If the commissioner finds that any person is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he [shall] MAY issue an order to such person maintaining such facility or condition to take the necessary steps to correct such potential source of pollution. Any person who receives an order pursuant to this section shall have the right to a hearing and an appeal in the same manner as is provided in section 25-54o and 25-54p. If the commissioner finds that the recipient of any such order fails to comply therewith, he [shall] MAY request the attorney general to bring an action in the superior court for Hartford county to enjoin such person from maintaining such potential source of pollution to the waters of the state. All actions brought by the attorney general pursuant to the provisions of this section shall have precedence in the order of trial as provided in section 52-191.

Sec. 13. Section 25-54l of said supplement is repealed and the following is substituted in lieu thereof: Whenever the commissioner issues an order to abate pollution to any person pursuant to the provisions of section 25-54h or 25-54j, and the commissioner finds that such person is not the owner of the land from which such source of pollution emantes, he may issue a like order to the owner of such land or shall send a certified copy of such order, by certified mail, return receipt requested, to the owner at his last-known post-office address. When the commissioner issues SUCH an order to an owner, the owner and the person causing such pollution shall be jointly and severally responsible. Any owner to whom SUCH an order is issued or who received a certified copy of an order pursuant to this section shall be entitled to all notices of, and rights to participate in, any proceedings before or orders of the commissioner and to such hearing and rights of appeal as are provided for in sections 25-54o and 25-54p.

Sec. 14. Section 25-54p of said supplement is repealed and the following is substituted in lieu thereof: Any person or municipality aggrieved by any order of the commissioner OTHER THAN AN ORDER UNDER SECTION 2 OF THIS ACT to abate pollution may, after a hearing by the commissioner as provided for in section 25-54i or section 25-54o, appeal from the final determination of the commissioner based on such hearing to the court of common pleas for Hartford county within fifteen days after the issuance of such final determination. Such final determination shall be sent by certified mail, return receipt requested, and shall be deemed issued upon deposit in the mail. Such appeal shall have precedence in the order of trial as provided in section 52-192. All appeals taken pursuant to this section shall be based solely upon the record of the hearing required in section 25-54i or section 25-54o. The court shall determine whether the commissioner acted arbitrarily, unreasonably or contrary to law. If, upon any such appeal, any question of law is raised which any party claims should be reviewed by the supreme court, the common pleas court judge shall forthwith transmit a certificate of his decision, including therein such question of law, together with a proper finding of fact, to the chief justice of the supreme court who shall thereupon call a special session of said court for the purpose of an immediate hearing upon the question of law so certified. The chief justice of the supreme court may make such orders as will expedite said appeal, including orders specifying the manner in which the record on appeal may be prepared.

Sec. 15. Subsections (b) and (c) of section 25-54mm of said supplement are repealed and the following is substituted in lieu thereof: (b) If any person or municipality violates section 25-54ll or this section, the commissioner [shall] MAY institute an action in the superior court for Hartford county to enjoin the continuance of such violation, such action to have precedence in the order of trial as provided in section 52-191; provided, in the case of a municipality, the commissioner, in lieu of instituting such action, may notify the public works commissioner to take such steps as are necessary to cause the discharge of such municipality to comply with any outstanding order to abate pollution, and the powers of such municipality shall be pro tanto suspended until completion and such municipality shall be obligated to pay to the state for the municipality's share of the cost of such steps plus one-tenth of one per cent of such share. The commissioner of environmental protection shall determine a schedule of payments for said obligation, which payments shall be made in not more than twenty equal annual instalments. If such municipality fails to pay any such instalment, the commissioner shall notify the comptroller who shall thereafter withhold his order for the payment of any form of state aid or grant to such municipality except those provided under titles 10 and 17 until the total of such withheld payments equals the total of any such unpaid instalments.

(c) If any municipality violates the terms of any injunction obtained in accordance with the provisions of this section, the commissioner [shall] MAY notify the public works commissioner, with a copy of such notice to such municipality, to take such steps as are necessary to cause the discharge of such municipality to comply with the terms of such injunction, and the powers of such municipality shall be pro tanto suspended until completion, provided, however, that such municipality shall be obligated to pay to the state for the municipality's share of the cost of such steps plus one-tenth of one per cent of such share. The commissioner of environmental protection shall determine a schedule of payments for said obligation, which payments shall be made in not more than twenty equal annual instalments. If such municipality fails to pay any such instalment, the commissioner shall notify the comptroller who shall thereafter withhold his order for the payment of any form of state aid or grant to such municipality except those provided under titles 10 and 17 until the total of such withheld payments equals the total of such unpaid instalments.

Sec. 16. Section 25-54qq of said supplement is repealed and the following is substituted in lieu thereof: Any person who violates any provision of sections 25-54nn to 25-54pp, inclusive, MAY [shall] be fined not less than one hundred dollars nor more than three hundred dollars for the first offense, and not less than three hundred dollars nor more than five hundred dollars for the second and each subsequent offense. A separate and distinct offense shall be construed to be committed each day on which such person shall continue or permit any such violation.

Sec. 17. This act shall take effect from its passage.

Certified as correct by

Legislative Commissioner.

Clerk of the Senate.

Clerk of the House.

Approved ____________________, 1973.

Governor.

APPENDIX B

WAUKEGAN v. POLLUTION CONTROL BOARD

57 Ill.2d 170

The CITY OF WAUKEGAN et al., Appellees,

v.

The POLLUTION CONTROL BOARD et al.

Appeal of ENVIRONMENTAL PROTECTION AGENCY et al.

No. 45984.

Supreme Court of Illinois.

March 29, 1974.

Rehearing Denied May 31, 1974.

Proceeding on appeal from action and order of the Pollution Control Board assessing fines against cities and corporation. The Appellate Court of the Second District, 11 Ill.App.3d 189, 296 N.E.2d 102, reversed and the Board appealed. The Supreme Court, Ward, J., held that the provision of Environmental Protection Act authorizing Board to impose civil penalties for violation of Act does not violate separation of powers provisions.

Judgment of appellate court reversed.

1. Constitutional Law 🔑13

Provision of 1970 Constitution relating to separation of powers is essentially the same as that of 1870 Constitution and there is no intent to change existing law. S.H.A.Const.1970, art. 2, § 1.

2. Constitutional Law 🔑50

Constitutional declaration of separation of powers does not mean that the legislative, executive and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, but only that the whole power of two or more of these departments should not be lodged in the same hands whether of one or many. S.H.A.Const.1970, art. 2, § 1.

3. Constitutional Law 🔑50

Separation of power does not forbid every exercise of function by one branch of government which conventionally is exercised by another. S.H.A.Const.1970, art. 2, § 1.

4. Constitutional Law 🔑62(10)

Health and Environment 🔑21

Authority given by Environmental Protection Act to the pollution control board to impose a penalty not to exceed $10,000 for violation of act or board regulation or order and an additional penalty not to exceed $1,000 for each day of continuing violation does not violate constitutional separation of powers. S.H.A. ch. 110, § 264 et seq.; ch. 111½, §§ 1021(e), 1033(b), 1041, 1042; S.H.A.Const.1970, art. 2, § 1.

5. Health and Environment 🔑25

On review of findings and orders of Pollution Control Board, court might consider all questions of law and fact in the entire record. S.H.A. ch. 110, § 275 et seq.; ch. 111½, §§ 1033(c), 1041; S.H.A.Const. 1970, art. 11, §§ 1, 2.

6. Administrative Law and Procedure 🔑305

Legislature may confer those powers on administrative agency that are resonably necessary to accomplish legislative purpose of agency.

◆

William J. Scott, Atty. Gen., Springfield (Thomas J. Immel, Asst. Atty. Gen., and Merideth Wright, Senior Law Student, of counsel), for appellants.

Conzelman, Schultz & Snarski and Hall, Meyer, Fisher, Holmberg, Snook & May, Waukegan (Murray R. Conzelman, Waukegan, of counsel), for appellees.

WARD, Justice.

In October, 1971, the Illinois Environmental Protection Agency filed a complaint with the Pollution Control Board (hereafter, the Board) against the City of Waukegan, Zion State Bank and Trust Company, T-K City Disposal, Inc., and Tewes Co., Inc., charging various violations of the Environmental Protection Act, including a charge of having operated a refuse disposal site without obtaining a permit from the Environmental Protection Agency (Ill. Rev.Stat. 1971, ch. 111½, par. 1021(e)). After a hearing, the Board imposed a fine of $1000 against the City of Waukegan, and fines of $250 against the T-K Disposal, Inc., and Tewes Co., Inc., The charges against the Zion State Bank and Trust Company were dismissed by the Board.

The Board's order was appealed by the City of Waukegan, T-K Disposal, Inc., and Tewes Co., Inc., to the Appellate Court for the Second District under provisions of the Environmental Protection Act and the Administrative Review Act (Ill.Rev.Stat. 1971, ch. 111½, par. 1041; ch. 110, par. 264 et seq.). That court, holding that the grant of authority to the Board to impose a discretionary fine was an unlawful delegation of judicial power, reversed and set aside the Board's order. (11 Ill.App.3d 189, 296 N.E.2d 102.) We granted leave to appeal.

But one question is before us: Was the authority given the Board to impose monetary penalties under the Environmental Protection Act (Ill.Rev.Stat.1971, ch. 111½, pars. 1033(b), 1042) a delegation of judicial power in violation of the separation-of-powers provision of the Constitution of Illinois or in violation of the Constitution of the United States?

The challenged section of the Act confers authority on the board to impose a penalty of not to exceed $10,000 for a violation of the Act, or of a Board regulation or order, and to impose an additional penalty not to exceed $1,000 for each day of continuing violation.

Whether the grant of authority was valid has been considered in three other appellate districts. The court for the Fifth District held that the constitutional separation of powers had been violated (Southern Illinois Asphalt Co. v. Environmental Protection Agency, 15 Ill.App.3d 66, 303 N.E.2d 606), and in the First and Third Districts the delegation of power was held to be valid (Ford v. Environmental Protection Agency, 9 Ill.App.3d 711, 292 N.E.2d 540; Incinerator, Inc. v. Illinois Pollution Control Board, 15 Ill.App.3d 514, 305 N.E. 2d 35).

[1] It is not disputed that there is before us only the question of the imposition of civil penalties. There is no contention that the penalties concerned here were designed to be or are considered criminal sanctions. See 1 K. Davis, Administrative Law Treatise sec. 2.13 (1958).

Section 1 of article II of the Constitution of Illinois of 1970, S.H.A. provides:

> "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

The provision is essentially the same as that of our 1870 Constitution. The only change is in simplified language. There was no intent to change the existing law. The report of the Committee on Local Government on the Proposed Separation of

Powers Article of the 1970 Constitutional Convention states in part:

> "The Committee did not intend to effect a change in the common law which has developed from the present language [i. e., of 1870 Constitution]." (6 Record of Proceedings, Sixth Illinois Constitutional Convention 566.)

The following comment also indicates that, consistent with decisions under the 1870 Constitution, no inflexible separation of powers was being considered:

> "The point was made during Committee deliberations that the present language may be construed as being inconsistent with a constitutionally created commission, agency or office (such as Ombudsman) having powers similar to one or more of the three principal governmental departments. The Committee is of the view that neither the present language nor the proposed language is inconsistent with such a hybrid commission, agency or office." 6 Proceedings 566–567.

[2] One of the earliest (1839) and one of the enduring commentaries in Illinois on the separation of powers appears in Field v. People ex rel. McClernand, 3 Ill. (2 Scam.) 79, 83–84. It was said:

> "The first and second sections of the first article of the [1818] Constitution divide the powers of Government into three departments, the legislative, executive, and judicial, and declare that neither of these departments shall exercise any of the powers properly belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle; and, although one of vital importance, it is to be understood in a limited and qualified sense. It does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many. That this is the sense in which this maxim was understood by the authors of our government, and those of the general and State governments is evidenced by the constitution of all. In every one, there is a theoretical or practical recognition of this maxim, and at the same time a blending and admixture of different powers. This admixture in practice, so far as to give each department a constitutional control over the other, is considered, by the wisest statesmen, as essential in a free government, as a separation."

Field has had a continuing vitality. In 1966 we cited *Field* in Hill v. Relyea, 34 Ill.2d 552, 557, 216 N.E.2d 795, 798, saying: "[T]he true meaning, in theory and in practice, of the doctrine of separation of powers is 'that the whole power shall not be lodged in the same hands, whether of one or many.' (Field v. People ex rel. McClearnand, 2 Scam. 79, 83.) The separation of powers doctrine was not designed to achieve a complete divorce between the three departments of a single operating government. (People v. Reiner, 6 Ill.2d 337, 129 N.E.2d 159.)"

[3] It has been generally recognized that separation of powers does not forbid every exercise of functions by one branch of government which conventionally is exercised by another branch. Professor Frank Cooper (1 F. Cooper, State Administrative Law 16 (1965)) observes: "[T]he real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments." He also indicates that it may be irrelevant if an agency has legislative or judicial characteristics so long as the legislature or the judiciary can effectively correct errors of the agency. The notion was stated more fully in 1 K. Davis, Administrative Law Treatise 68–69 (1958):

> "In the organic arrangements that we have been making in recent decades in the establishment and control of adminis-

trative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power. The very identifying badge of the modern administrative agency has become the combination of judicial power (adjudication) with legislative power (rule making). But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary." See also Davis, A New Approach to Delegation, 36 U.Chi.L.Rev. 713 (1969).

The Supreme Court of the United States has never considered that the powers in government are held in rigidly separated compartments. Professor Davis (1 K. Davis, Administrative Law Treatise sec. 2.12, at 131) has observed: "The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency, although the question has come up in [many] cases * * *." Nor has the court expressed alarm or undue concern about conferring a power to impose monetary penalties on an administrative body. As early as 1909 the court upheld the grant of power to the Secretary of Commerce and Labor to impose monetary penalties for violations of an immigration statute. In Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013, 1022, it was said:

> "In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

See also Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341; Elting v. North German Lloyd, 287 U.S. 324, 53 S.Ct. 164, 77 L.Ed. 337; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917; N. A. Woodworth Co. v. Kavanagh, 102 F.Supp. 9, 11, aff'd (6th Cir.), 202 F.2d 154.

Partly as a consequence of the court's decisions, many Federal agencies have been empowered by the Congress to impose monetary penalties directly, that is, on the agency's own action and authority. See, *e. g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. sec. 666 (1970); the Postal Service, 39 U.S.C. secs. 5206, 5603 (1970), 49 U.S.C. sec. 1471 (1970), C.F.R. secs. 927.1, 927.2 (1971), Allman v. United States, 131 U.S. 31, 9 S.Ct. 632, 33 L.Ed. 51; the Immigration Act, 8 U.S.C. sec. 1229 (1970); the Federal Home Loan Bank Act, 12 U.S.C. sec. 1425b(b) (1970); Atomic Energy Commission, 42 U.S.C. sec. 2282 (1970); Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, 45 U.S.C. sec. 435 (1970); Endangered Species Conservation Act of 1969, 16 U.S.C. sec. 668 (1970); Water Pollution Control Act, 33 U.S.C. secs. 1321(b), 1415 (1970); Ports and Waterways Safety Act of 1972, 33 U.S.C. sec. 1226; Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. sec. 1433; Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. sec. 136l; Marine Mammal Protection Act of 1972, 16 U.S.C. sec. 1375; see also Goldschmid, 2 Recommendations and Reports of the Administrative Conference of the United States, July 1, 1970–December 31, 1972, app. I (hereafter cited as Administrative Conference).

The Administrative Conference of the United States (5 U.S.C. sec. 571 et seq.) in a recommendation to the Congress made on December 14, 1972 (Recommendation 72-6, entitled "Civil Money Penalties as a Sanction") observed: "Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed. * * * Increased use of civil money penalties is an important and salutary trend. * * * In many areas of increased concern (*e. g.*, health and safety, the environment, consumer protection) availibility of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals." 2 Administrative Conference 67-68.

In a report in support of Recommendation 72-6 Professor Harvey Goldschmid stated: "Although a few questionable state cases exist, the leading commentators (1 K. Davis, secs. 2.12-2.13; L. Jaffe [Judicial Control of Administrative Action (1965)] 109-15; W. Gellhorn, [Administrative Prescription and Imposition of Penalties, 1970 Wash.U.L.Q. 265,] 285) and a number of Supreme Court decisions (see, *e. g.*, Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 53 S.Ct. 167, 77 L.Ed. 341 (1932); Elting v. North German Lloyd, 287 U.S. 324, 53 S.Ct. 164, 77 L.Ed. 337 (1932); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 29 S. Ct. 671, 53 L.Ed. 1013 (1909)) indicate that an administrative imposition system can surmount constitutional barriers. This report concludes that there are no significant constitutional impediments to such a system, even though agencies will, at times, be delegated functions traditionally exercised by Congress or the courts." 2 Administrative Conference, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies 896, 901-902.

State courts as well have approved grants of power to administrative agencies to impose monetary penalties.

New York's insurance law providing for monetary penalties for violations after notice and hearing by the superintendent of insurance has been upheld. (Old Republic Life Insurance Co. v. Thacher (1962), 12 N.Y.2d 48, 234 N.Y.S.2d 702, 186 N.E.2d 554.) In Jackson v. Concord Co. (1969), 54 N.J. 113, 253 A.2d 793, the Supreme Court of New Jersey observed that there could not be any valid constitutional objection to the grant of authority to award money damages "at this advanced date in the development of administrative law" (54 N.J. at 126, 253 A.2d at 800) and in view of a provision in the statute for judicial review. The Supreme Court of Utah held that a statute authorizing the Public Service Commission to impose discretionary monetary penalties was not unconstitutional. Citing Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 the court said it was "well established" that an agency might be given such authority without violating the separation of powers. Wycoff Co. v. Public Service Commission (1962), 13 Utah 2d 123, 126, 369 P.2d 283, 285; see also Rody v. Hollis (1972), 81 Wash.2d 88, 500 P.2d 97; General Drivers & Helpers Union Local 662 v. Wisconsin Employment Relations Board (1963), 21 Wis.2d 242, 124 N.W.2d 123.

We would observe, too, that by statute in Pennsylvania the Environmental Hearing Board may impose monetary penalties for violations of the State's Clean Streams Law. (Pa.Stat. tit. 35, sec. 691.605 (1970).) In United States Steel Corp. v. Department of Environmental Resources (1973), 7 Pa. Cmwlth. 429, 300 A.2d 508, the court considered the fairness of a penalty that had been imposed, but no challenge was made to the delegation of authority to the Board.

It is clear that the trend in State decisions is to allow administrative agencies to impose discretionary civil penalties. See W. Gellhorn, Administrative Prescription and Imposition of Penalties, 1970 Wash.U. L.Q. 265; McKay, Sanctions in Motion: The Administrative Process, 49 Iowa L. Rev. 441 (1964); K. Davis, 1 Administrative Law Treatise sec. 2.12.

This court has upheld the delegation to administrative agencies of the power to impose what practically, though not formally, may be considered penalties. (See, *e. g.*, Cermak Club, Inc. v. Illinois Liquor Control Comm., 30 Ill.2d 90, 195 N.E.2d 178 (revoking a license); Vissering Mercantile Co. v. Annunzio, 1 Ill.2d 108, 115 N.E.2d 306 (publishing names of minimum-wage-law violators); Gadlin v. Auditor of Public Accounts, 414 Ill. 89, 110 N.E.2d 234 (denying a license); People ex rel. Rice v. Wilson Oil Co., 364 Ill. 406, 4 N.E.2d 847 (entering penalty on bond to secure tax payments); see also Nolting v. Civil Service Comm. of Chicago, 7 Ill.App.2d 147, 129 N.E.2d 236 (discharging or otherwise disciplining police officer).) It has been observed that, realistically viewed, there is no significant difference between the power given to impose what really operate as penalties, such as in the above instances, and the power to impose a monetary penalty. Davis, sec. 2.13; Jaffe, Judicial Control of Administrative Action 112.

This court has also considered cases in which there were delegations of what clearly were set out as powers to impose penalties. In Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. People ex rel. Barter, 212 Ill. 638, 72 N.E. 725, for example, this court held that the authority of the tax assessor and county clerk to assess a penalty against land owners who fail to clean streams on their lands, as required by the Drainage Act, constituted an unconstitutional delegation of judicial power. However, under the statute there were no standards for the guidance and control of the administrative officers, no provisions for hearing and none for judicial review.

In Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908, the Prevailing Wage Act was considered. That act provided a penalty of $10 a day against any contractor for public work for each employee who was not paid the prevailing wage. The Act authorized the Department of Labor or the other public contracting body to withhold these penalties from the contract price to be paid the employer. This court held, citing Cleveland Cincinnati, Chicago and St. Louis Ry. Co. v. People ex rel. Barter, that the statute conferred judicial authority contrary to the constitutional separation of powers. However the statute in *Reid* bears little resemblance to the legislation before us. In *Reid* the Prevailing Wage Act was declared unconstitutional, because, *inter alia*, while the statute provided that in all contracts for public works the contractors had to pay the prevailing local wage per diem, the statute neither defined the term "prevailing wage per diem" nor furnished a standard for ascertaining such a wage.

In Department of Finance v. Cohen, 369 Ill. 510, 17 N.E.2d 327, the statutory power to impose a tax penalty was upheld, and in Department of Finance v. Gandolfi, 375 Ill. 237, 30 N.E.2d 737, the authority to enter tax-deficiency assessments was approved. However, the amounts of the penalties in these cases were determined purely by application of an arithmetical formula.

We would note also that under the Workmen's Compensation Act (Ill.Rev. Stat.1971, ch. 48, par. 138.19(k)) if there has been any unreasonable or vexatious delay of payment due under the Act, the Industrial Commission may award compensation additional to that payable under the Act equal to 50% of the award. We have never passed on the constitutionality of the Commission's having been given this power to penalize, but this court has upheld penalties imposed by the Commission. See Board of Education v. Industrial Comm., 351 Ill. 128, 184 N.E. 202; Dyer v. Industrial Comm., 364 Ill. 161, 4 N.E.2d 82.

We have already noted, in comments quoted from Cooper and Davis, the importance given by courts to the presence or absence of provisions for judicial review of administrative action, when considering questions of improper delegations of powers. Opportunity for judicial review certainly has been influential in the decisions of this court when claims have been made that delegations to administrative agencies have violated the separation of powers. This has been described by Braden and Cohn in their Illinois Constitution: An Annotated and Comparative Analysis (1969), prepared for the Illinois Constitution Study Commission:

> "As a general rule, delegation to administrators or agencies of the quasi-judicial power to adjudicate rights or to revoke privileges such as licenses is not invalid so long as there is an opportunity for judicial review of the administrative action. Such judicial review normally permits an aggrieved party to contest the fairness of the procedure used, the constitutionality of the substance of the regulatory statute and implementing rules and regulations, the correctness of the administrator's interpretation of the statute under which he operates, and whether or not his decision was arbitrary. In short, if the judiciary is given an adequate opportunity to review what has been done, the principle of separation of powers—or due process of law, if you will—is generally satisfied." Braden and Cohn, at 104–105.

[4] Turning to the Environmental Protection Act, we consider that the authority given the Board to impose monetary penalties does not violate the constitutional separation of powers. The interpretations given the separation doctrine by this court and by the Supreme Court of the United States, the decisions approving delegations of authority to impose civil penalties, the detailed hearing and related provisions of the statute, the Act's providing for adequate judicial review, and the statute's establishment of protective guidelines that the Board must follow in imposing penalties, direct this conclusion.

To consider some of the Act's provisions: It separates the investigative and prosecuting body, the Environmental Protection Agency, from the adjudicative body, the Board. (Ill.Rev.Stat.1971, ch. 111½, pars. 1004–1006.) The statute requires notice to be given of complaints filed with the Board. (Ill.Rev.Stat.1971, ch. 111½, par. 1031(a).) At the public hearing, which is required, the parties have a right to be representated by counsel, to cross-examine witnesses, and to exercise subpoena power, and the standard of admissibility for evidence is the standard under the law of rules of evidence in civil actions. Ill.Rev.Stat.1971, ch. 111½, pars. 1031, 1032; Pollution Control Board Regulations 301–333.

As additional protection against arbitrariness, and as guidelines for the Board, the Act provides that:

> "In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source." Ill.Rev.Stat.1971, ch. 111½, par. 1033(c).

[5] The Act provides that the findings and orders of the Board are reviewable by the appellate court under the Administrative Review Act (Ill.Rev.Stat.1971, ch. 111½, par. 1041; ch. 110, par. 275 et seq.). The court may consider all questions of law and fact in the entire record. Cases reviewed and the holdings include: Citizens

Utilities Co. v. Pollution Control Board, 9 Ill.App.3d 158, 289 N.E.2d 642 (Board may not impose monetary penalty as a condition to granting a variance); Seegren v. Environmental Protection Agency, 8 Ill.App.3d 1049, 291 N.E.2d 347 (Board's finding is not supported by the evidence); McIntyre v. Pollution Control Board, 8 Ill.App.3d 1026, 291 N.E.2d 253 (Board's finding is not supported by the evidence), and North Shore Sanitary Dist. v. Pollution Control Board, 2 Ill.App.3d 797, 277 N.E.2d 754 (Board cannot base its findings on information not in the record).

The people of this State have expressed their determination to preserve and improve the environment. Article XI of the Constitution of 1970 provides:

> "Section 1. Public Policy—Legislative Responsibility
>
> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.
>
> Section 2. Rights of Individuals
>
> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."

The Environmental Protection Act, enacted in 1970, is consistent with the command of section 1 of article XI. An agency to make investigations throughout the State and present complaints of environmental abuse was provided. A Board was created to conduct hearings and to make appropriate determinations and orders, including the imposition of penalties. The Act obviously contemplates a specialized statewide and uniform program of environmental control and enforcement. The legislature considered this could be more readily brought about if the responsibility of imposing penalties was placed on the same authority that conducted hearings and determined violations.

[6] The Board is to conduct hearings and, if violations are found, appropriately it is to impose penalties. The legislature may confer those powers upon an administrative agency that are reasonably necessary to accomplish the legislative purpose of the agency (Department of Public Works and Buildings v. Lanter, 413 Ill. 581, 587, 110 N.E.2d 179; Reif v. Barrett, 355 Ill. 104, 133, 188 N.E. 889), and we consider that it was appropriate to give the Board the authority to impose monetary penalties.

There are adequate standards provided and safeguards imposed on the power given the Board to impose these penalties. The granting of this authority does not constitute an unconstitutional delegation of judicial power.

For the reasons given, the judgment of the appellate court is reversed.

Judgment reversed.

APPENDIX C

SUMMARY

AN EVALUATION OF THE PRESENT AND POTENTIAL USE OF CIVIL MONEY PENALTIES AS A SANCTION BY FEDERAL ADMINISTRATIVE AGENCIES

by

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Prepared for

COMMITTEE ON COMPLIANCE AND
ENFORCEMENT PROCEEDINGS

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

November 17, 1972

The increased use of civil money penalties in recent years constitutes an important and salutary trend. The civil penalty provides an ideal flexible sanctioning tool: it avoids the stigma of criminal conviction and the harshness of "all or nothing" remedies such as license revocation while it works as an effective deterrent against offensive behavior.

Despite the growing popularity of civil penalties, federal agencies have not yet devised an imposition system capable of handling such cases fairly and efficiently. The vast majority of agencies today must be successful in a de novo adjudication in a district court before any penalty can be imposed. This process is cumbersome and time-consuming for the agencies and highly unsatisfactory for many alleged offenders, who will often settle out of court for a slightly reduced assessment despite a belief in their own innocence in order to avoid heavy litigation expenses. On the other hand, many of the worst offenders are able to escape virtually unscathed by employing a host of devices designed to further prolong the enforcement process.

One solution to the problem is to allow the agencies themselves to impose the penalties. Under this system, an agency would provide for an adjudicatory proceeding pursuant to Section 5-8 of the Administrative Procedure Act and adopt rules of practice to maximize the chance of securing just, speedy and inexpensive adjudications. An agency's decision would be final unless appealed within a stipulated number of days. The decisions would stand if supported by substantial evidence. The adversarial and decisional functions of the agency would of course be made separate, and procedures for mitigation and compromise would be retained.

There are no significant constitutional barriers to such a system.